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# HARVARD LAW REVIEW.

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## MUNICIPAL CONTRACTS AND THE REGU- LATION OF RATES.

A STREET railway company, a gas or electric light company, a telephone or water company, and all similar companies, must ordinarily, in order to operate within the limits of a city, first obtain the consent of the proper municipal authorities for the necessary use of the public streets. A contract between the city and the company or individual engaging in such business is usually the result. The company makes certain promises, agrees to certain conditions with respect to the conduct of its business, in consideration of the grant to it of a right to use the streets, and of possible promises and undertakings on the part of the city. Very commonly the rates to be charged for the services offered by the company to the city or its inhabitants are made the subject of an express provision in the contract, and it is proposed in this article to deal with the various questions arising with reference to such rate provisions contained in municipal contracts.

The scope and effect of such provisions as to rates will depend not only upon the form of the agreement with reference thereto contained in the contract, but upon the power and authority of the city to deal with the question of rates to be charged by persons engaged in a public service business. In the first place, it may be that no express power to deal with the subject of rates has been granted to the city by the legislature. In such case, what would be the effect of an agreement as to rates contained in a contract

between a city and a public service corporation? Secondly, if an express power to legislate upon the subject of rates were granted to the city, might that be regarded as in some respects excluding the power to contract, and if so, what effect would that have upon a contract as actually made? And then, thirdly, what may be the scope of such a contract in a case where the city has been delegated a general power to regulate rates, and has been authorized also to contract with reference thereto? It is proposed to consider the cases with respect to the three different powers thus lodged in the municipality.

### I.

A city may lawfully exercise only those powers which the state legislature has seen fit to confer upon it, and it has been very generally held that the power to regulate the use of the streets does not include a general power to regulate from time to time the rates to be charged the public by persons and corporations permitted to use the streets and alleys of a city for the conduct of a public service business<sup>1</sup> That does not prevent the city, however, from including in an ordinance granting to a public service company a right to use the streets, some provision upon the subject of rates.

In the first place, it must be borne in mind that no power to legislate upon the subject of rates is required to enable the city to contract and agree upon a price for water or gas or a telephone service to be furnished to the municipal corporation itself. If the city have power to supply itself with any of these things the absence of a power to legislate generally upon the subject of rates does not prevent the city from agreeing upon the price it will pay for services agreed to be rendered to the municipal corporation. Over what period of time the city may be authorized to bind itself by contract to pay an agreed price for a particular service is a totally different question from the right of the city to contract with reference to a legislative power to regulate rates. As we shall see later, this plain distinction between two separate municipal powers has been frequently lost sight of, especially where a pro-

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<sup>1</sup> *St. Louis v. Bell Telephone Co.*, 96 Mo. 623; *In re Pryor*, 55 Kan. 724; *Wabaska Electric Co. v. Wymore*, 60 Neb. 199; *State, ex rel. Wisconsin Telephone Co. v. City of Sheboygan*, 111 Wis. 21, 37-40; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49; *City of Noblesville v. Noblesville Gas and Improvement Co.*, 157 Ind. 162; *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39.

vision as to the price to be paid by the city, and a provision as to rates to be charged private users or consumers, are included in a single contract.

If a municipal corporation has been given authority to supply its own need for water or gas, it must, in the absence of some express limitation, have power to agree upon the price to be paid. No express power to pay for what the city is authorized to buy can be required. Having the power, the city's contract in this respect would stand upon the same footing as a contract made between an individual and the company, and the obligation of the city to pay the agreed price would be protected by the Constitution of the United States from impairment by any subsequent exercise of the legislative power of the state, either by state legislature or city council.<sup>1</sup>

Furthermore, although possessing no general power to regulate rates, the city may nevertheless include, as a condition of the ordinance, some provision as to the rates to be charged the inhabitants of the city. In consideration, that is, of its grant of a right to use the public streets, the city may, if possible, obtain some concession on the part of the company with reference to rates, — a promise, for instance, that the company will not, during the term of the contract, charge more than a certain rate for the services it proposes to offer. Such a provision as to rates would obtain its whole force and effect by virtue of its contractual character, as an obligation assumed, for good consideration, by the company. This is clearly stated in a recent case in Indiana.<sup>2</sup> The supreme court there says: —

“The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to consumers. But it was under no compulsion to convey such right to

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<sup>1</sup> *Bellevue Water Co. v. Bellevue*, 35 Pac. Rep. 693 (Idaho); *Reed v. City of Anoka*, 88 N. W. Rep. 981 (Minn.); *Agua Pura Co. v. Mayor of Las Vegas*, 60 Pac. Rep. 208 (New Mexico).

Whether in such case the subsequent act of the city council should be regarded as a law impairing the contract, or merely as an act of the city in the nature of a breach or repudiation of the contract, might often be a question. *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 265. But see *American Waterworks & Guarantee Co. v. Home Water Co.*, 115 Fed. Rep. 171; *Anoka Waterworks Co. v. City of Anoka*, 109 Fed. Rep. 580; *Little Falls Electric & Water Co. v. City of Little Falls*, 102 Fed. Rep. 663.

<sup>2</sup> *City of Noblesville v. Noblesville Gas & Improvement Co.*, 157 Ind. 1 2, 169.

See to the same effect: *Westfield Gas and Milling Co. v. Mendenhall*, 142 Ind. 538, 544, *Zanesville v. Gaslight Co.*, 47 Oh. St. 1, 31.

any one. The subject of grant rested in contract, like any other matter. As the price of the right, the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals. . . . That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract ; and the power to regulate as a governmental function, and the power to contract for the same end, are quite different things."

The agreement on the part of the company in such a case might even be to charge not more than the city might from time to time determine, and the reservation by the city in such a contract of a right to regulate rates might be given that interpretation ; but the force of an act of the city fixing the rates to be charged by that particular company would depend, under such circumstances, upon the right so given by the contract.<sup>1</sup> It would not have the effect of legislation. The company could not by contract enlarge the legislative powers of the municipality.

As the contract in such a case is made by the city in the absence of, and therefore without reference to, any legislative power over the subject of rates, it follows that the existing legislative power of the state is not bound so that it may not subsequently be exercised to reduce the maximum named in the contract. The only existing contract obligation with regard to rates is the obligation imposed upon the company not to charge more than the agreed maximum. There is no agreement that the company may charge at least that amount. No obligation to pay the maximum rates was assumed by the inhabitants of the city, nor was any obligation not to alter those rates imposed upon the state legislature, by the promise of the company to charge no more than the rates named in the contract. The state, therefore, in such a case may afterwards legislate so as still further to limit the rates which such corporations may charge the general public without rendering such act open to the objection of impairing the obligation of the contract as to rates made between the city and the particular corporation.<sup>2</sup> And if the contract provision as to the rates to be charged the municipal corporation itself is of the same character, establish-

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<sup>1</sup> Compare the reservation contained in *Los Angeles v. Los Angeles City Water Co.*, referred to *infra*.

<sup>2</sup> *City of Indianapolis v. Navin*, 151 Ind. 139, 142.

ing a maximum charge merely, and not amounting to an agreement on the part of the city to pay a certain amount, then the city also may claim the advantage of a subsequent legislative reduction of rates.<sup>1</sup> It follows also that, as the rate provision is merely a contract obligation binding as such upon the company, and not binding upon the inhabitants of the city, the courts, at the instance of the latter, may declare the company's charges under the ordinance in fact unreasonable and excessive.<sup>2</sup>

The inhabitants of the city not being bound by such a contract, what are their rights with regard to it? They are not parties to the contract, the company has made no promise to them, and the provision as to rates cannot be appealed to as a legislative enactment. Whatever effect may be given such a provision where the city has power to legislate upon the subject of rates, in the class of cases now under consideration all the force which such a provision can have must depend upon its contractual character. The question presented, therefore, is the right of a third party to enforce a promise in a contract made for his benefit. The city council, in exacting the promise regarding maximum rates, is not seeking to discharge any legal obligation owing by the city to the individual inhabitants, nor has the city any pecuniary interest in the company's fulfilment of its promise. The individual citizens are, therefore, in the strictest sense, mere beneficiaries, and their right to sue for failure of the company to perform its promise as to rates can be supported only in those jurisdictions where the doctrine of "sole beneficiary" prevails.<sup>3</sup> No doubt the promise in these rate cases is expressly directed to, and is intended for the benefit of private users or consumers, and these cases may therefore be distinguished from those in which it has been held that a citizen cannot maintain an action against a water company on account of the destruction of his property by fire, by reason of the failure of the company to perform its promise to the city to furnish water at a certain pressure to the city fire department.

In those states, therefore, where the doctrine of "sole beneficiary" appears to be accepted, there would probably be no difficulty in allowing individual citizens to sue and recover damages by reason of any injuries received on account of the failure of the

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<sup>1</sup> *Zanesville v. Gaslight Co.*, 47 Oh. St. 1, 31.

<sup>2</sup> *Griffin v. Water Co.*, 122 N. C. 206.

<sup>3</sup> See Professor Williston's article, "Contracts for the Benefit of a Third Person," 15 HARV. L. REV. 767.



company to perform its agreement as to rates.<sup>1</sup> And a bill for an injunction by a private consumer, to prevent the shutting off of his supply of water or gas on account of a refusal to pay rates higher than the maximum fixed in the contract between the city and the company, has also been sustained on the ground that the injury threatened was such as demanded relief in equity.<sup>2</sup>

There is more difficulty with respect to allowing a remedy by mandamus, as it is well settled that mandamus is not available in case of an obligation merely contractual. And where mandamus has been allowed it is not always clear that the court did not intend to hold that the municipality had the power and did, in effect, legislate upon the subject of rates.<sup>3</sup> One view for sustaining mandamus in these cases has, however, been suggested. Parties engaged in a public service business are bound to serve the community without discrimination and at reasonable rates. Each person, therefore, entitled to the service has a right to demand it upon offering to pay a reasonable price, and a public service corporation, after agreeing upon a maximum rate in its contract with the city, may be held in no position to deny that any amount above the maximum was unreasonable.<sup>4</sup> Yet where a citizen chooses to rest his claim upon a right to a reasonable rate, and not upon his right as beneficiary under an express contract, certainly the company, as against him, ought to be able to show, if possible, that the maximum rate is unreasonably low. Moreover, a writ of mandamus to compel the company to serve a citizen at reasonable rates comes very close to asking the court to fix the rates. There is authority, however, that mandamus may be brought for that purpose.<sup>5</sup>

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<sup>1</sup> *Adams v. Union R. R. Co.*, 21 R. I. 134; *Gaedke v. Staten Island Midland R. R. Co.*, 43 N. Y. App. Div. 514.

<sup>2</sup> *Westfield Gas & Milling Co. v. Mendenhall*, 142 Ind. 538; *Smith v. Birmingham Water Works Co.*, 104 Ala. 315.

In a Texas case (*Cleburne Water Co. v. City of Cleburne*, 35 S. W. Rep. 733) the company had made a contract with the city in which it agreed to charge private consumers of water not more than certain named rates. A bill for an injunction was prayed by the city to restrain the company from charging citizens more than the agreed rates. Relying upon a previous case to the effect that a citizen could not sue a water company on account of the loss of his property by fire, the court concluded that private consumers could not sue upon the promise of the company in this case, either, and held that, *therefore*, the bill by the city should be sustained.

<sup>3</sup> *Richmond Railway & Electric Co. v. Brown*, 97 Va. 26.

<sup>4</sup> *People v. Suburban Railway Co.*, 178 Ill. 594, 606.

<sup>5</sup> *People, ex rel. Brush v. New York Suburban Water Co.*, 38 N. Y. App. Div. 413.



## II.

Now let us suppose that express power has been granted to the city to fix rates by an exercise of legislative power, and in that situation the city enters into a contract which contains a provision with respect to rates. What will be the force of the rate provision contained in such a contract?

In the case of *Rogers Park Water Co. v. Fergus*,<sup>1</sup> decided two years ago by the United States Supreme Court, it appears that by an act of the Illinois legislature passed in 1872, providing for the incorporation of cities and villages, the authorities of cities and villages were given power to construct waterworks "and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." By an ordinance passed in 1888 the village of Rogers Park "contracting with H. E. Keeler, his successors and assigns," sought to provide for a supply of water for the village. Keeler was granted the exclusive right for a period of thirty years of maintaining and operating a system of waterworks, and it was provided by section 12 of the ordinance that "the said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise," with an option as to charging meter rates. Then followed a schedule of maximum rates for uses specified. Keeler assigned to the Rogers Park Water Company. In 1893 the village of Rogers Park was annexed to the City of Chicago. In 1891, by a statute of the state of Illinois, municipalities were "empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished" by individuals or companies operating water works. In 1897 the city council of Chicago fixed by ordinance maximum charges for water which were less than the maximum rates in the Rogers Park ordinance of 1888. A writ of mandamus was brought by Fergus, an inhabitant of the town, to compel the Rogers Park Water Company to supply him with water at the rates fixed by the Chicago ordinance. A demurrer to the answer of the company was sustained by the Illinois courts, and the Supreme Court of the United States affirmed the judgment.

Mr. Justice McKenna, in delivering the opinion of the court,

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<sup>1</sup> 180 U. S. 624.

referred to a decision already rendered<sup>1</sup> to the effect that the Illinois statute of 1872, quoted above, did not give to municipalities power to grant for thirty years the right to charge particular rates agreed upon. The power to authorize the construction of water works "at such rates as may be fixed by ordinance, and for a period not exceeding thirty years" was considered, so far as rates were concerned, to confer a power to legislate and not a power to contract. If the village did, therefore, intend, to grant to Keeler a right to charge for a period of thirty years up to the maximum rates named in the ordinance of 1888, that grant was without authority. The court, however, following the Illinois Supreme Court, held that the provision as to rates in that ordinance could not properly be considered as part of the contract, but rather as an exercise of the legislative power conferred upon the city, without any agreement that such power would not be exercised again during thirty years. So interpreted, the Rogers Park ordinance was in the form authorized by the legislature, and did not prevent the operation of the subsequent legislative regulation of rates by the city of Chicago.

It is submitted that the decision in this case might well be rested upon the ground suggested in connection with the cases already considered. Whether expressly authorized to regulate rates or not, the village of Rogers Park could certainly enter into the kind of contract actually made in this case, — an agreement fixing the maximum rates to be charged by the other party to the contract in consideration of the grant by the village of a right to use the public streets. Such an agreement, in the absence of a power in the village, as is held in this case, to contract away legislative control over rates, could not fairly be interpreted as having any other effect than to bind the water company not to charge more than the maximum rates named. The contract would therefore be subject to a subsequent exercise of the legislative power of the municipality reducing rates.

The view suggested would avoid the necessity of holding the rate provision included in the accepted ordinance a legislative enactment. And certainly, irrespective of the difficulty as to the intention of the parties, there are serious objections to holding such provisions contained in contracts acts of legislation. The provision has reference to the rates to be charged by the party to

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<sup>1</sup> Freeport Water Co. v. Freeport, 180 U. S. 587.

the contract only, and if that party is bound, not because he has *agreed* to the provision, but because it is a law of the state, then certainly in many cases he might raise the objection that as legislation it is bad because special.

And now as to the situation of the municipal corporation itself. Suppose the municipality, in addition to being authorized to supply itself with water or gas is authorized to legislate upon the subject of rates charged by water or gas companies. Does that power to legislate in any way alter the effect of an agreement by a water or gas company to supply the municipal corporation at certain named rates? In this connection the important case for consideration is that of *Freeport Water Co. v. Freeport City*.<sup>1</sup>

In 1872 two statutes went into force in Illinois which conferred powers upon municipal corporations with reference to water supply. One, approved April 9, 1872, provided: "That in all cities and villages where waterworks may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years. Any such city or village, so contracting, may levy and collect a tax . . . to pay for the water so supplied." The other statute, approved April 10, 1872, was the one already referred to in connection with the Rogers Park case, which, after providing that cities might construct waterworks, empowered city councils "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years."

In 1882 the city of Freeport enacted an ordinance giving to Nathan Shelton or his assigns exclusive right for thirty years to supply the city and its citizens with water. Section 7 of the ordinance provided that Shelton should erect fire hydrants and the city pay an agreed annual rental for said hydrants "during the full term specified in this ordinance." In 1891 a statute of Illinois empowered municipalities "to prescribe by ordinance maximum rates and charges for the supply of water furnished" by individuals or companies, and in 1896 the city of Freeport passed an ordinance which, amongst other things, reduced the annual rentals for fire hydrants to be paid to the Freeport Water Company, to whom Shelton's rights had been assigned. The Water Company brought

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<sup>1</sup> 180 U. S. 587.

an action of assumpsit against the city for water furnished in 1896, and claimed that the ordinance of 1896 impaired the obligation of the contract of 1882. The U. S. Supreme Court, in affirming the judgment of the Illinois courts rendered against the contention of the water company, considered the statutes as "certainly ambiguous" with respect to the power over rates granted to the city, and, resolving that ambiguity in favor of the public and leaning also toward agreement with the decision of the state court, held that the city of Freeport did not have power to make, as it attempted, an irrevocable contract for thirty years fixing the rates to be paid by the city for that period.

We have here, then, a case in which it is held that a city, apparently having power to contract for a supply of water for a period of thirty years, yet has no power to agree upon the price it will pay for the water which the other party may supply to the city itself under the contract. The majority of the court, and the dissenting judges as well,<sup>1</sup> make no distinction whatever between the power of the city to make a contract agreeing to pay a certain price for water furnished to the city itself, and the power of the city, as was contended in the Rogers Park case, to bind itself by contract so that it may not during thirty years exercise its legislative power to reduce the rates charged to private consumers. Now admitting the correctness of the construction adopted by the court in the Rogers Park case, that the words "at such rates as may be fixed by ordinance" contained in the statute of April 10, 1872, gave to the city authority to regulate rates by the exercise of legislative power, and excluded the right of the city so to contract that it might not exercise that legislative power in the future, it by no means follows that the city did not have power to agree to pay a certain price for water to be furnished to the municipal corporation itself during a period of thirty years. Because, that is, the express power to regulate rates from time to time by legislation deprived the city of the right to contract away that legislative control, it did not also and necessarily follow that the city might not make a separate contract binding itself to receive and pay an agreed price for water agreed to be furnished to it in a particular way for a definite period. The same question as to the power granted cities and villages by the Illinois statutes did not arise in the Rogers Park case that was presented in the Freeport case,

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<sup>1</sup> See the dissenting opinion in the Rogers Park case.

though the court, majority and dissenting judges alike, apparently regarded it as the same. In the one case the question was as to the power of the city to obligate itself not to reduce the rates to be charged private consumers; in the other as to the power of the municipality to obligate itself to pay an agreed price for water furnished the municipality itself. The obligations of both contracts, if valid, would be protected from impairment by the Constitution of the United States, but the obligations were not identical, and the question of the power to create them not the same.

And now as to the power of the city to make the contract in question in the present case. The first thing to be noticed is the difference in the powers given by the statute of April 9 and that of April 10, 1872. The statute of April 9 gives municipalities power to contract with water companies<sup>1</sup> that may then be already established, "for a supply of water for public use, for a period not exceeding thirty years." This clearly gives to cities and villages power to make a contract which shall bind the water company to furnish and the municipality to receive water for a period of thirty years. No express power to agree to pay for what the city was thus authorized to contract for could be required, and the statute makes no mention of any particular method of fixing the price. If the question in this case arose under this statute, dealing as it does merely with contracts made by the city for a supply of water to the municipality itself, there could hardly be any doubt of the power of the city to agree upon the price to be paid for the water furnished. But the statute of April 10, as is pointed out in the dissenting opinion, had reference to a different situation, and contemplated the establishment of a water system in cities and villages where none then existed, and evidently had in mind the needs of the inhabitants as well as of the municipal corporation. It was with reference to such a situation that the contract in question was made, and the case is decided finally upon the construction of the statute of April 10. That statute, in addition to authorizing municipalities to construct waterworks on their own account, gave them power "to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty

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<sup>1</sup> In the Freeport case the contract was not made directly with the water company, but through an individual who assigned to the company. In the Danville case (180 U. S. 619), the decision of which was controlled by the decision in the Freeport case, the contract was made directly with the company.

years." Now this statute does not in terms say anything about the right of the city by contract to bind itself to receive water for a period of thirty years; it merely gives to the city power to grant to a person or private corporation a right *to construct and maintain waterworks for a period of thirty years*, and a power to fix rates, as the court holds, by legislative ordinances. As regards contracting for a supply of water to meet its own requirements, this statute, so far as any express power is concerned, leaves the city where it was before. That is to say, whether the city might contract, with the person or corporation proposing to construct and maintain waterworks, for a supply of water to the city itself for a period of thirty years, was not determined by any of the express powers contained in the act of April 10.

Now there can be no doubt that an individual might, if he chose, contract for a supply of water for thirty years at an agreed price. He could not lawfully be deprived of his freedom to make such a contract.<sup>1</sup> Whether a municipality might make a similar contract to supply its own needs would depend upon its granted powers, and in the Freeport Water Company case the court holds that the city, whether or not it had power to bind itself to receive a definite supply of water for thirty years, at any rate had no power to agree to pay a fixed price for its supply for that period. The decision in this case, then, must mean that where a city, as is held in this and the Rogers Park case, has been granted legislative power, by means of which it may regulate the rates to be charged by a person or corporation proposing to construct and maintain waterworks, it may not enter into a contract binding itself to receive water from that person or corporation at an agreed price for a period of thirty years, and thereby deprive itself of the advantage of such subsequent legislative regulations of rates as the city council may itself enact under its delegated powers. In that case the only agreement as to rates which could be included in the ordinance granting the franchise would be an agreement fixing maximum rates to be charged by the company to the city and its various departments, as well as to private consumers. Such a provision, if accepted by the company, would be subject to further reduction by the legislative power delegated to the city

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<sup>1</sup> Where the company is allowed to charge only such rates as may be fixed by the municipality, the validity of private contracts for a different rate would be another matter. See *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22 (the head-note is inaccurate), and *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 104 Fed. Rep. 706.



council, as was held in the Ohio case to which reference has already been made.<sup>1</sup> The curious thing is that if the city of Freeport had waited until the Freeport Water Company had become established, it might then, under the authority given by the act of April 9, have contracted "for a supply of water for public use for a period not exceeding thirty years," and that statute in no way indicates that the price to be paid could be such only as might be fixed by the legislative power of the city. That statute dealt specifically with the kind of contract made in the Freeport case, and if the city had authority in contracting for its own wants to anticipate the actual establishment of the corporation, and contract at the same time that it granted the franchise to operate, then the statute of April 9 would seem to indicate the kind of contract that might be made.

We may sum up, then, as follows. Where a city has been delegated authority to fix rates by ordinance, that may mean authority to fix rates by legislative enactment, and may exclude the power to contract away such legislative control. That is the Rogers Park Water Company case. The power to fix rates by ordinance may also be construed in some cases to mean that the city, in providing for its own needs, may not enter into an agreement which, if valid, would prevent it from taking advantage of subsequent legislative regulations of rate by the city council. The city, that is, being authorized to supply its own wants at such rates as may be fixed by legislative action of the city council, may not by contract deprive itself of the advantage of rates so fixed. That is the Freeport Water Company case.

### III.

The decision in the Rogers Park case has shown that express authority granted to a city to fix rates by legislative enactment may be considered as excluding the power to bind by contract that right of legislative control. Now suppose the city is expressly directed by the legislature to fix rates by contract. What, then, will be the effect of a contract so made?

In the case of *Detroit v. Detroit Citizens Street Railroad Co.*,<sup>2</sup> recently decided by the United States Supreme Court, it appears that by the street railway act of Michigan, passed in 1867, under

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<sup>1</sup> *Zanesville v. Gaslight Co.*, 47 Oh. St. 1, 31.

<sup>2</sup> 184 U. S. 368.

which some of the companies owned by the appellee were organized, it was provided that the rate of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities." The ordinances of the city of Detroit, which were accepted by these companies, provided that the fare for any route named should not exceed five cents. The bill in the present case was filed by the railway company to restrain the enforcement of subsequent ordinances of the city of Detroit, passed in 1899, reducing the rates of fare below five cents for any one route, and providing for transfers from one route to another upon the payment of a single fare of five cents. The court held that the accepted ordinances constituted contracts between the railway companies and the city, and that the provision as to rates was an agreement by which the companies were bound to charge not more than five cents for the routes named, and were given the right, so far as any legislative power of the city to regulate rates was concerned, to charge at least that amount. The ordinance of 1899, therefore, impaired those contracts.

Unfortunately it is not stated in the opinion when the power to legislate upon the subject of rates was delegated to the city of Detroit.<sup>1</sup> That the city had such power in 1899 must be assumed. Otherwise there was no law impairing the obligation of contracts, and no federal question to be considered.<sup>2</sup> But it is not clear whether the court took the view that the city had this power to legislate at the time these contracts were made, or was delegated such power subsequently. The reference in Mr. Justice Peckham's statement of the case to the city's charter of 1883, which gave to the city a general power of control and regulation over the streets, may indicate that the court considered the power to legislate was given then, perhaps, for the first time. That was after the contracts were made. Moreover, Mr. Justice Peckham in delivering the opinion says: "It is plain the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties, and not as an exercise of a governmental function of a legislative character by the city authorities

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<sup>1</sup> A similar ambiguity appears in the case of *Cleveland City Railway Co. v. City of Cleveland*, 94 Fed. Rep. 385.

<sup>2</sup> *People's Gaslight & Coke Co. v. City of Chicago*, 114 Fed. Rep. 384, 388. And compare *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. Rep. 39.



under a delegated power from the legislature. It was made matter of agreement by the express command of the legislature." This may mean, however, not that the city did not at the time the contracts were made have a general power to legislate upon the subject of rates, but that it was directed to contract and not to legislate in this particular case. Having already, that is, a general power to regulate rates, it may be the court intended to hold that in this instance the city was expressly authorized to limit that power by contract; that it did, by the contracts as made, agree not to exercise that legislative power so as to reduce the rates of fare below the maximum named, and that the ordinance of 1899 was therefore an impairment of the obligations of those contracts.

Viewed in this way, the case would be similar to that of *Los Angeles v. Los Angeles City Water Co.*<sup>1</sup> In that case it appeared that the municipality possessed the power "to provide for supplying the city with water." It seems to have been conceded that this gave the city a right to regulate rates. In that situation the municipality, in 1868, leased to the assignors of the Los Angeles Water Company its system of waterworks for a term of thirty years, and granted a right to use the streets of the city for the purpose of operating the plant. The contract provided also "that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assignees, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water." Suit was brought by the Water Company to annul an ordinance passed by the city of Los Angeles in 1897 on the ground that it fixed rates at figures below those agreed upon in the contract of 1868. The ordinance was passed in pursuance of the California constitution of 1879, giving authority to cities to regulate water rates from year to year. Counsel for the city, admitting that the municipality in 1868 had a general power to regulate water rates, appear to have contended that the contract of 1868 had no reference to that power, and that the agreement that the city would not reduce rates below a certain figure did not bind its legislative power at all, but merely the municipality in its capacity of lessor and landlord. The court denied this contention, holding that the

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<sup>1</sup> 177 U. S. 558.

contract was intended to bind the legislative power of the state as exercised by the city, that the question of the power of the city so to contract was closed by an act of the legislature in 1870 ratifying the contract, and that therefore the contract of 1868 was impaired by the subsequent legislation.

It is clear that if the city of Los Angeles did not possess a legislative power over water rates in 1868, then the contract reservation to the city of the right to regulate rates, provided they were not reduced below the figures named, could have merely the force of an ordinary contract provision as between lessor and lessee; but conceding the existence of the power to regulate rates, the contract was open to the construction placed upon it by the court, so that the power reserved was a power to legislate, and the power to reduce rates agreed not to be exercised beyond a certain point was a legislative power.

The contracts, therefore, in the Detroit Street Railway case and in the Los Angeles Water Company case have the same result, although in the one case there was merely the fixing of a maximum rate which the company was not to exceed, while in the other there was an express agreement by the city not to reduce rates below a certain point. Evidently the contract obligation that is protected from impairment is in both cases the same. Whether we say that the company has a right to charge private consumers up to the maximum, or that the city may not reduce the rates to private consumers below a certain point, in both cases we refer to an obligation imposed directly upon the city. If we say that the Detroit Street Railway Company has the right to charge passengers at least five cents, we do not mean that individual passengers have obligated themselves by contract to pay that fare, but that the city has agreed that, so far as its power to regulate rates is concerned, that power shall not be exercised to reduce rates below five cents. The only right affecting the company's charge to individuals which the city can grant to the company is a right to be free from the interference of the legislative power of the city. The municipality, when given authority, may contract to receive so much water or gas and pay so much for it, but it cannot agree how much individual citizens will take or how much they will contract to pay. That kind of agreement the individuals must make for themselves. The agreement, therefore, in the Detroit Street Railway case, which, as interpreted by the court, creates an obligation which would be impaired by a reduction of rates, must be similar to the

agreement contained in the Los Angeles Water Company case, and forbids an exercise of legislative power by the city, reducing rates below the amount named.

The further question then occurs, whether this result could properly be reached in the Detroit Street Railway case unless the city of Detroit, at the time the contracts in question were made, possessed power to legislate upon the subject of rates of fare? As we have already learned from the Rogers Park case, a power delegated to the city to regulate rates by legislation may not include a power to contract with reference thereto, and it may well appear strange, therefore, that a municipality could make a valid contract agreeing not to exercise such a legislative power even before any right to regulate rates had been delegated to it. On the other hand, the legislature, in directing that the matter of rates should be determined by agreement between the city and the company, may have intended that the company should secure a definite contract which could not later be modified by any action of the city at least. In that case, however, a clear expression of intention might well be required, and if the city at the time possessed no legislative power to regulate rates, it would be going far, certainly, to construe a legislative direction to the municipality to agree upon rates as conferring a power to contract away a right to regulate rates not yet granted to the city.

In case the city of Detroit, at the time it made these railway contracts, did not possess power to regulate rates of fare, one other explanation of the decision might be suggested. The court may have considered the "command" of the legislature contained in the Railway Act, to fix the rates of fare by contract, as authorizing the city, acting as representative of the state, to make a contract which should bind the power of the state over rates as possessed by the state legislature. Then when the legislature, in 1883, impliedly authorized the city to regulate rates, the city acquired that power to legislate coupled with the limitations contained in the previous contracts. There would appear to be no reason why the legislature might not authorize a city, which itself possessed no power to legislate upon the subject of rates, to make a bargain with respect to the future exercise of such legislative power by the legislature. But it is more than doubtful if the court in the Detroit Street Railway case can be regarded as so interpreting the contracts there in question. The statement in the opinion, "The legislature has not attempted to interfere

with the rights of the street railway companies in Detroit, and hence the extent of its power so to do is not involved in this case," would appear sufficient to negative any suggestion that the court proceeded upon a theory which would necessarily require a holding that the power of the legislature to regulate rates was bound.

Might it not well be, it is submitted, that the contracts that the Michigan legislature authorized and expected the cities and villages to make, were exactly the kind of agreements actually made by the city of Detroit in these cases,—agreements fixing the maximum rate which the companies should charge in consideration of the right to use the streets? And might not that agreement be considered as made subject to, and not with the idea of limiting, the legislative power of the state reasonably to regulate the charges of public service corporations? Then the only question for determination in the present case would be whether the city had at any time been delegated legislative power over the subject of rates, and had properly exercised that power by the ordinance of 1899.<sup>1</sup> Even under the direction in the Railway Act that the rates should be fixed by agreement with the city, might not the city obtain for itself the most favorable agreement possible, and should the rule of construction applied to the interpretation of the ordinances be more unfavorable to the city in this case than in the Rogers Park case?

In conclusion, it may be well to notice two questions which have been suggested from time to time during the previous discussion,

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<sup>1</sup> In *People's Gaslight & Coke Co. v. City of Chicago*, just decided by Judge Grosscup in the United States Circuit Court, seventh circuit (National Corporation Reporter, July 31, 1902), it appears that the Gas Company filed a bill to enjoin the enforcement of an ordinance of the city of Chicago, fixing the price of gas at seventy-five cents a thousand feet, on the ground that the ordinance impaired a contract between the state and the company. The Gas Consolidation Act of 1897, under which the present company operates, contains the following provision: "Such corporation shall not increase the price charged by it for gas of the quality furnished to consumers during any part of the year immediately preceding such purchase or lease or such consolidation or merger." It was contended that this gave the company a contract right to charge a price at least as high as that for the "year immediately preceding," which was not less than one dollar per thousand feet, and that the city could not by legislation reduce that price. The court held that the legislature did not undertake to agree upon an unalterable rate, but merely named a rate beyond which the company should not go, and that the case was therefore unlike the Detroit Street Railway case. It would appear, therefore, that the mere possession of a power to regulate rates and a power to contract will not render a contract provision fixing maximum rates an agreement that the legislative power shall not be again exercised to reduce those rates.

but which have not yet come to an express decision. The agreement in the Los Angeles case was that the municipality would not reduce rates below a certain point. The contract by its terms bound the city only. Did that mean that the legislative power of the state, only as delegated to and exercised by the city, should not be employed to reduce rates, and that the power of the state legislature was in no way bound? The Supreme Court in that case referred to the objection of counsel that the city had no power to bind the state, and held it as settled that the state might authorize the city so to bind it, and that the city was so authorized in that case. It is not clear, however, in just what respect, if at all, the court was there intending to hold the state bound. In the opinion of the Circuit Court in the same case<sup>1</sup> we find this language used :

“The parties manifestly intended by the clause now under consideration that the lessees should have a right to the minimum rates prescribed, namely, the rates that were then charged ; and, if the city was authorized to make such an agreement, neither it *nor the legislature of the state* could thereafter lawfully reduce the rates below the minimum so agreed upon.”

This, once more, would appear to be confusing the contract obligation not to legislate with the obligation of the city or an individual to pay a certain price agreed upon. The valid obligation of the city or individual to pay the agreed price would be protected from subsequent legislative regulation of either state legislature or city council. But the question here is as to the promise of the city not to reduce rates charged private consumers, and whether the subsequent regulation of rates by the state legislature would in any way impair the obligation of that contract. In this connection the language already quoted from the last case on this subject decided by the Supreme Court, the Detroit Street Railway case, is significant. The court in that case, although holding that an attempted reduction of rates by the city would impair the obligation of the earlier contracts, expressly refrained from giving any opinion as to the power of the legislature to alter the rates. It may be safe to conclude, therefore, that, although the legislature might authorize the city to bind the legislature as well as the city council, yet the authority given, or the contract actually made by the city, might be such as would bind the city

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<sup>1</sup> 88 Fed. Rep. 720, 729.

only and leave the power of the state legislature to regulate rates free.

One further point may finally be noticed with reference to the necessity of distinguishing between a contract by a city to pay an agreed price for some commodity furnished to the municipality itself, and a contract by a city with reference to the exercise of its legislative power over rates. When the city or an individual citizen has made a valid contract agreeing to pay a definite price for water or gas to be furnished such city or individual, all question of the reasonableness of the price so agreed upon is closed between the parties during the period of the contract. But when the city, in its contract with the company, undertakes to name the rates which the company may charge private consumers, or agrees not to reduce those rates by legislation, are private consumers prevented during the term of that contract from questioning the reasonableness of the rates charged them?

In the case of *Santa Ana Water Co. v. Town of San Buenaventura*<sup>1</sup> it appears that in 1869 the town authorities made a contract with certain parties providing for a supply of water for the town and its inhabitants, granting a right to use the streets of the town, and providing also that such parties "shall have the unrestrained right to establish such rates for the supply of water to private persons as they may deem expedient, provided that such rates be general." An ordinance of the town passed in 1892, fixing the rates to be charged to the inhabitants, was held an impairment of the obligation of the contract. So far, that is, as the city's legislative power was concerned, the Water Company had a right to fix its own rates. It was no longer for the city to say what was reasonable. Whether the rates charged by the company were reasonable or unreasonable, the legislative power of the city was bound by the contract not to interfere. But did that mean that the individual citizens themselves might not appeal to the courts if the rates were in fact unreasonable, and that the courts could not consider the question of reasonableness?

If it be true, as was stated by Mr. Justice Brewer in *Reagan v. Farmers' Loan & Trust Co.*,<sup>2</sup> that the province of the courts to inquire as to the reasonableness of rates is not altered because the legislature has prescribed the rates, then the existence of a contract binding the legislature or city council not to reduce rates

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<sup>1</sup> 56 Fed. Rep. 339.

<sup>2</sup> 154 U. S. 362.

below a certain point would not limit the jurisdiction of the courts to inquire as to the reasonableness of the rates charged individuals. If the jurisdiction of the courts, however, in the protection of citizens against unreasonable charges, is limited to those cases in which the legislative power of the state has not been exercised, or has been exercised improperly, then the right of the courts to interfere, in a case where a city has agreed that the rates shall not be reduced below a certain point, would be more questionable.

*Herbert Pope.*

CHICAGO.



## LEGITIMACY AND MARRIAGE.

A CHILD'S relation to his parents may be regarded from the standpoint of morality or from the standpoint of law. He is a member of a family, physically connected with his father and mother, and the respective rights and duties of parent and child are a matter of elementary morality. If the parent's duty to care for his offspring has been fully recognized only within a comparatively recent past, the duties of parents have always been urged by natural affection, and the liberty to refuse to assume paternal obligations, found in some early systems of law, has long since disappeared. But the child and his parents are members of an organized community, and their respective rights and duties, arising from their position in that community, are regulated by law, which for reasons of its own has limited natural rights, requiring for the legal recognition and enforcement of those rights certain conditions precedent. And it has also created rights not derived from the simpler ideas of natural rights, but finding their justification in the necessities of a complex society. It has even made it possible for mutual rights and duties to arise between persons not related as parent and child, identical with those founded upon a natural relation. There is, accordingly, a clearly marked distinction between what might be called a child's natural or moral rights and his legal rights. It is in connection with the latter class of rights that the notion of legitimacy arises, a notion entirely distinct from the notion of paternity and filiation, however closely it may be connected with it.

The principal legal difference between a legitimate and an illegitimate child is that, in general, only the former is capable of inheriting either from an intestate father or through a father deceased. He cannot inherit name, titles, or honors from or through his father. For all purposes of inheritance he is a *filius nullius*. If, therefore, his father leaves legacies to each of his children merely describing them as such, and does not specially describe the bastard, the latter would not receive it under the designation "child," even though the parentage was well known and acknowledged by the father. Other disabilities which have been recognized by law are less fundamental and have not been due to any



profound legal principle, but rather to the disrepute of bastardy. But though a bastard is, in general, a *filius nullius* in respect to inheritance, he is not a *filius nullius* in every respect. For he has a right of support, or alimentation, from his natural father; and although in modern systems of law a new reason for the enforcement of this right has been found in the prevention of the bastard's becoming a public charge, the principle underlying this right has long been recognized.<sup>1</sup> Again, illegitimate children themselves may have very different powers and capacities in both Civil and Canon Law, according to the relation of their parents to each other. If born of incest or adultery, they do not have the rights as to legitimation which would have been theirs if they had been born of *fornicatio simplex*. If their mother is a *concubina in domo recepta*, they might be regarded as in a still more favorable position.<sup>2</sup> The contradiction in the law whereby an illegitimate child may be a *filius nullius* in some respects, and not a *filius nullius* in other respects, raises the question as to the historical origin of the distinction between legitimacy and illegitimacy. The question appears the more important when it is recalled that the difference between a bastard and a lawful issue is due, in general, to the existence of a marriage between the latter's parents. What is there in marriage to give rights to offspring which otherwise would not have been theirs? The exceptions to the rule requiring marriage only render the question more interesting.

The traditional explanation<sup>3</sup> of the familiar rule concerning legitimacy, *pater est quem nuptiæ demonstrant*,<sup>4</sup> is, that since it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir. But this rule, which has passed into probably all modern systems of jurisprudence, merely raises a presumption, according to the Civil Law, only if the child was born at least six months after the marriage was contracted<sup>5</sup> and not more than ten months after its dissolution.<sup>6</sup> Even within these limits there was no conclusive presumption, for proof to the

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<sup>1</sup> Cf. Hostiensis, *Summa aurea*, Basilæ, 1572, p. 1096, ad X. *qui filii sint legitimi*, 4, 17; Panormitanus, *Commentaria super libros Decretalium*, Lugduni, 1555, IV. 40 b ad c 6, X. 4, 17.

<sup>2</sup> Panormitanus, l. c.

<sup>3</sup> E. g. Nov. 89, 1, 1. Cf. Puchta, *Pandecten*, § 41.

<sup>4</sup> D. 2, 4, 5.

<sup>5</sup> D. 1, 5, 12; 38, 16, 3, 12.

<sup>6</sup> D. 38, 16, 3, 11; C. 6, 29, 4.

contrary was not excluded.<sup>1</sup> All this passed into the Canon Law and has been widely accepted. Even the extravagant extension which the rule obtained in England in the Common Law has been abandoned in favor of a position similar to that in the Civil Law. It would appear then that paternity and filiation was the essential point, and that marriage was evidence, though by no means conclusive, of paternity.

But not so. For, although in the case of children born of a lawful concubine,<sup>2</sup> *liberi naturales*, as distinguished from *spurii*, *adulterini*, *vulgo quæsit*i, etc., paternity could be proved, and in course of time such children, just because paternity and filiation was certain, obtained some limited advantages in respect to alimentation and succession, they were, nevertheless, illegitimate because there was no marriage. But if, as was the rule from the time of Constantine,<sup>3</sup> the parents subsequently married each other, with certain specified formalities designed to facilitate proof, the *liberi naturales* became *liberi legitimi*, and this result evidently depended upon a certainty of paternity in the case of concubinage equal to that in the case of marriage. It follows that marriage was much more than a means of ascertaining paternity; there was something attaching to the notion of marriage which was regarded as the basis of this very different notion,—legitimacy. The inquiry is thus thrown back to a period in which the notions of marriage and of legitimacy were more closely connected and in which the family constitution was more clearly defined.

In the Civil Law a child inherited from his intestate father, not because he was related to him by blood, but because he was a *filiusfamilias* or in the *potestas* of a *paterfamilias* at the time of the latter's death. If he ceased to be *in potestate*, *i. e.* ceased to be a *filiusfamilias*, and this might happen in case of a change of status or *capitis diminutio*, *e. g.* by emancipation, he lost his rights of succession.<sup>4</sup> He might by a legal transaction even become a *filiusfamilias* in another family than that into which he

<sup>1</sup> D. 1, 6, 6; 25, 3, 1, 14; *cf.* D. 22, 3, 29; 48, 5, 12, 9.

<sup>2</sup> *Cf.* X. *qui filii sint legitimi*, 4, 17, and the comment of Hostiensis, *op. cit.*; Durandus, *Speculum Juris*, Francofurti, 1592, III. 446; and Panormitanus, *op. cit.* especially, ad c. 2, eod. tit. IV. 38, b.

<sup>3</sup> D. 25, 7; C. 5, 26; 5, 27.

<sup>4</sup> C. 5, 27, 5.

<sup>5</sup> D. 4, 5, 3, 1. In the later law (A. D. 502), however, by an *emancipatio Anastasiana* his rights of succession might be retained. C. 6, 58, 11. But this was after the law had long since undergone a transformation in respect to succession.

had been born.<sup>1</sup> Marriage was merely the condition on which children begotten by a *paterfamilias* were in his *patria potestas*, and it had this in common with adoption or arrogation, that it was a means of acquiring, at least in early law, a sort of ownership. In the early marriage, the wife passed into the *manus* of her husband, and it would appear that her children would be born into the same *manus* or *potestas*.<sup>2</sup> The *filiusfamilias*, not begotten but acquired by adoption or arrogation, came into the *patria potestas* by a ceremony strikingly similar to one form of marriage, — *coemptio*. It was a conveyance *per æs et libram*.<sup>3</sup> But the foundation of legitimacy is not to be found in the relation of ownership in which the *paterfamilias* stood to his wife. For though the child of an *ancilla*, who was herself just as much *in potestate* as was a *filia familias*,<sup>4</sup> belonged to her owner, because of his right in her, yet the child of an *ancilla* was not a *filiusfamilias* even if begotten by the *paterfamilias* himself.<sup>5</sup> Why should the children of one woman have privileges as to succession denied the children of another woman placed in a similar relation of dependence, although the father of all the children might be the same person? Why should marriage make such a distinction?

The legal rights of the *filiusfamilias* are not to be derived from the *manus* or *patria potestas*, however closely they may be connected in Roman law of the historical period, but from the primitive constitution of the family, *i. e.* of a time anterior to the application to domestic relations of terms and notions derived from a developed law of property. That constitution was that of a quasi-religious corporation in which the ancestral rites were perpetuated and offerings made to the *manes*. That such a constitution of the family, resting not upon legal conceptions but upon non-juristic ideas, had been developed very early in the Latin race is one of the surest conclusions of comparative jurisprudence. Identical conceptions are found in Rome, Greece, and

<sup>1</sup> D. i, 7, 1.

<sup>2</sup> From the terms *emancipatio*, *mancipium*, etc., it is evident that *manus* had been once applied to other relations than marriage, covering, in fact, different cases of ownership. Further the *manus* in the case of the marriage of a *filiusfamilias* belonged to his *paterfamilias*, and in the case of a dissolution of a marriage by divorce, the *manus* remained with the former husband until it was conveyed to some one else. Cf. Gai., Inst. i. 137, a.

<sup>3</sup> Gai., i. 134. For the conveyance with brass and balances, see Gai., i. 119 f.

<sup>4</sup> Gai., i. 52, 125; the wife *in manu* was *in oco filia*, Gai. iii. 3.

<sup>5</sup> D. i, 5, 24; cf. J. i, 3; 1, 8.

India. In all three lands the succession to property is joined with the perpetuation of the domestic religion. According to Hindu law, "He who inherits the wealth, presents the funeral oblations."<sup>1</sup> According to Roman conceptions, succession to property and the worship of a family ought to be inseparable, and the care of the sacrifices always fall upon him who receives the inheritance.<sup>2</sup> In Greece the same idea appears, inheritance and the duty of offering the sacrifices are inseparable.<sup>3</sup> Marriage, as the act by which the family is founded, is not to provide an heir to property or titles, but one who can carry on the domestic religion.<sup>4</sup> Because the wife has been associated with her husband in the sacred rites of the household,<sup>5</sup> and was religiously taken<sup>6</sup> to perpetuate the religious corporation, her children have a part in the worship and are heirs. But it is not because she has come into the possession of her husband that her children are capable of carrying on the *sacra*, but because of her indissoluble association with her husband in the *sacra*,<sup>7</sup> because in Roman phrase there has been *divini et humani juris communicatio*.<sup>8</sup> Even should the husband be unable to beget children, he need not despair of a successor to his rights and duties. A son might be begotten for him upon his wife by a kinsman appointed for that purpose.<sup>9</sup> Such a son begotten upon the wife ranked highest among the various substitutes for a child begotten by the husband upon his wife. He was capable of inheriting the property and offering the sacrifices to the *manes*. Even if the husband should die without having made provision for a successor, or should have been so long absent that his death seemed probable, the wife might bear him an heir by a near kinsman.<sup>10</sup> The tie common to such cases is the wife's participation in the rites of the family.<sup>11</sup> This method of

<sup>1</sup> Institutions of Vishnu, ed. Julius Jolly, Sacred Books of the East, xv. 40; Baudhayana Dharmasastra, ed. Georg Bühler, *ibid.* ii. 2, 3. 18; Vasishtha Dharmasastra, ed. Georg Bühler, *ibid.* xvii. 23; Manu, ed. Georg Bühler, *ibid.* ix. 186.

<sup>2</sup> Cicero, De legibus, ii. 19, 66.

<sup>3</sup> Fustel de Coulange, La cité antique, Bk. ii. ch. 7, § 1.

<sup>4</sup> Cf. Vasishtha, xvii. 1-5, with quotations and references.

<sup>5</sup> Apastamba's Aphorisms on the Sacred Law, ed. Georg Bühler, S. B. of the E., ii. 6, 14, 17; ii. 5, 11, 13 ff.; Gautama's Institutes, ed. Georg Bühler, *ibid.* v. 7.

<sup>6</sup> Cf. Vasishtha, xvii. 72 ff.

<sup>7</sup> Cf. Apastamba, ii. 5, 11, 12-14; Manu, v. 167 f.

<sup>8</sup> D. 23. 2, 1.

<sup>9</sup> Gautama, xviii. 11; xxviii. 32; Vasishtha, xvii. 14; Vishnu, xv. 3; etc.

<sup>10</sup> Gautama, xviii 4, 15; xxviii. 22 f.; Vasishtha, xvii. 56 ff.; Manu, ix. 144 ff., 190; etc.

<sup>11</sup> The levirate marriage among the Hebrews presents many difficulties. As it appears in the Old Testament it is connected primarily with the right of succession

providing for the succession does not appear in Roman Law, nor do various other Hindu substitutes for natural issue, *e. g.* the appointed daughter whose son should be regarded as the child of his maternal grandfather, which as well as the appointed wife or widow survived in Greece.<sup>1</sup> Adoption, however, which appeared in all Hindu codes, became in Roman Law the only method of supplying the need of some one to continue the family *sacra*, and the adopted son obtained more important rights in Rome than in India, becoming in every respect a *filiusfamilias*. But the purpose of the adoption was to provide a substitute for, and not a rival to, the son begotten by the *paterfamilias* upon his wife.<sup>2</sup> For in Cicero's time it was still contrary to the immemorial law of adoption to adopt a son when there was already a *filiusfamilias*.<sup>3</sup>

In the Roman Law traces may still be found of a primitive notion that the capacity of the son to perform sacrifices depended upon the nature of the marriage rites by which his parents had been united. In the Hindu law<sup>4</sup> the different kinds of marriage rites had determined the abilities of the sons to benefit the deceased ancestors. Some could save more than others, the highest saving ten ancestors, ten descendants, and himself.<sup>5</sup> These rites were regarded as appropriate to different classes, and in the case of the lowest classes the very inferior rites conferred only a minimum of religious capacity upon the children born of the marriage. With this condition of the Hindu law should be compared the early Roman marriage by *confarreatio*, at one time the only rite whereby *justæ nuptiæ* could be contracted, the other rites apparently having disappeared. The plebeians to whom *confarreate* marriages were not open, could have no family *sacra*<sup>6</sup> and therefore no real marriage, *justæ nuptiæ*, or family. Even as late as the Empire sacerdotal capacity, at least in the case of the *Flamen Dialis*, depended upon birth in *confarreate* marriage.<sup>7</sup>

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It is a means of retaining the family portion in the same tribe and family. But it may well be based upon some notion similar to that of the Arvan institution. The Hebrew of the Old Testament, however, laid stress upon paternity rather than upon birth in lawful marriage. Cf. Benziger, *Hebräische Archeologie*, p. 135.

<sup>1</sup> Cf. Xenophon, *De repub. Laced.*, c. 1; Plutarch, Solon, c. 20.

<sup>2</sup> Gai., i. 103

<sup>3</sup> Cicero. *De domo sua*, c. 13.

<sup>4</sup> Cf. Gautama, iv. 15. 6 ff.; Apastamba, ii. 5, 11, 17 ff.; Manu, iii. 23 ff.

<sup>5</sup> Gautama, iv. 29 ff.; cf. Apastamba, ii. 5, 12, 4; Baudhayana, i. 11, 21, 1.

<sup>6</sup> Cf. Livy, iv. 2.

<sup>7</sup> Cf. Tacitus, *Ann.*, iv. 16; Gai., i. 136.

To sum the matter up, the general conception of marriage, its purpose and its effects, common to early Hindu, Greek, and Roman law, was that brought out in the question which, until well into imperial times, the censor put on the occasion of a marriage: <sup>1</sup> whether a wife was taken for the sake of begetting children; and by the conditions under which an *adrogatio*, or adoption of one who was himself a *pater familias*, could take place. For as the person adopted or arrogated necessarily forsook his own family *sacra*, his ancestors might suffer by his passing into another family and another worship, and to guard against such disastrous consequences, the pontiffs required full proof that there were still living brothers who might continue the sacrifices.<sup>2</sup> This general conception of marriage, its purpose and effects, does not rest upon legal notions, but is itself the basis of the legal principle. It does not find its explanation in the law, but it explains the law of succession.

A theory of marriage and legitimacy based upon the religious organization of the family, however well it might work in a large homogeneous population, was wholly unsuited to serve as the basis of law in a community made up of such different classes as were to be found from the first in Rome. The patricians alone had family *sacra*, and according to the primitive conception they alone had *justæ nuptiæ*, and consequently they alone had legitimate children. The plebeians had neither,<sup>3</sup> and their family organization was in the eyes of the patricians on that account notably defective. It is very probable that in the matter of marriage and legitimacy, as in the matters of property, the plebeians, who were long denied the employment of those legal forms which rendered family and property rights secure, had created, for themselves at least, a legal system which without the sanctions of law nevertheless rendered family life possible and property rights and succession to a certain extent respected. And a sort of marriage by

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<sup>1</sup> Gell., iv. 3; Fest., s. v. *quæso*; Sueton., Jul. Cæs., 52; Val. Max., viii. 7, 4. The same sentiment appeared in Greece: cf. pseudo-Demosth. in Neær., c. 122; Xenophon, Memor., ii. 2, 4; Plato, Legg., vi. p. 773. In all the Hindu codes the same idea occurs repeatedly. They are full of minute directions as to the duties of the "householder" in this respect; and the spiritual benefits to be derived from having sons and grandsons who might continue the sacrifices are described in most extravagant terms.

<sup>2</sup> Gell., xv. 27, 3. Cf. Savigny, Zeitschr. f. geschichtl. Rechtswissenschaft., ii. p. 401 ff.

<sup>3</sup> Cf. the contemptuous language of the patricians in opposition to the proposal of C. Canuleius, Livy, i. c.



habit and repute may have originated among the plebeians at a time when they were shut out from the employment of legal forms, and even before the *usus*<sup>1</sup> marriage was recognized and regulated by law.

To make *justæ nuptiæ* possible for the plebeians, and consequently to give them legitimate children, *i. e. in potestate*, another conception of marriage was substituted for that existing among the patricians, but with the same effect as that underlying the *confarreate* marriage. That conception was ownership, and *coemptio*, or a sort of conveyance of property, in place of initiation was the form under which the plebeian, as soon as legal property rights were granted him, was able to establish a secure marriage relation and have his children *in potestate* and as his heirs. There were reasons in the nature of the patrician marriage itself for the substitution of the legal notion of property for the religious notion as the basis of the family and rights resulting from the family. The husband's authority over his wife, or the *manus*, was so closely akin to property right as to be readily expressed by the same term,<sup>2</sup> and the power which he exercised toward his children was at one time as complete as that over a slave.<sup>3</sup> When the plebeian obtained the right of acquiring property *per æs et libram*, he could apply the same method to the acquirement of a property right, *manus*, in his wife: his children born of her were necessarily *in potestate*. By an easy analogy they received the same rights, *i. e.* in regard to succession, that the children of the patricians enjoyed. At about the same time and for similar reasons marriage by *usus* obtained the same stability and produced the same effects. For according to the XII. Tables, plebeian as well as patrician acquired, after a year's undisturbed possession,<sup>4</sup> the highest kind of ownership, Quiritarian, in movables. By this application to marriage of notions derived from the law of property, the *confarreate* marriage was not disturbed. The legal, as distinguished from the religious results of marriage, were merely extended to unions hitherto without the law. These were *justæ nuptiæ* which, according to the stereotyped phrase preserved by Modestinus, were a *divini et humani juris communicatio*, but were henceforth lacking in the *jus divinum*.

A still further extension of the rights originally due to the

<sup>1</sup> Cf. Gai., i. 111.

<sup>2</sup> See *supra*.

<sup>3</sup> Cf. Cicero, *De domo sua*, c. 29.

<sup>4</sup> Cf. Gai., i. 111; ii. 54; Cicero, *Top.* 4.

religious organization of the family began to appear in its earliest form almost at the same time as the plebeian forms of marriage by *coemptio* and *usus*. This new form was connected with the *usus* marriage, at first possibly with that form which preceded the legal definition of the term for the *usucapio*. If after the XII. Tables marriage by *usus* required one year's undisturbed possession, or marital cohabitation, what was the relation during that year? What was the relation of child to father if born during that year? What would be the status of the parents and the children if that *usus* was prevented by the interruption of the marital possession? Such questions must have arisen very early, for by the XII. Tables the interruption sufficient to prevent the acquirement of the *manus* by the husband was fixed at three consecutive nights.<sup>1</sup> This provision of the decemviral code could hardly have been intended to encourage illicit unions. There were, it can be easily seen, several disadvantages connected with the *manus*. The wife wholly ceased to be a member of her father's family. Her property as well as herself passed completely into her husband's hands, or that of his *paterfamilias*. The authority of the husband was enormously increased and the continuation of the union after it had become distasteful depended upon his will alone. A union in which the *manus* was not acquired because a year had not elapsed, or the *usus* had been interrupted, was a sort of marriage still. It was neither *stuprum* nor concubinage. But for a long time, at least, the children born in it were not *in potestate* and consequently had not Quiritarian rights of succession.<sup>2</sup>

A similar difficulty arose in connection with marriages between those who did not have the legal rights of Roman citizens and so could not employ even the forms of marriage based upon the legal notions of ownership and sale. Here there was no *patria potestas*, for that was a right peculiar to Roman citizens. In the same way there could be no *manus*, for that too was a *ius proprium civium*

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<sup>1</sup> Gai., i. 111; cf. Gell., iii. 2, 13.

<sup>2</sup> Cf. Karlowa, Die Formen der römischen Ehe und Manus. Bonn. 1868, p. 71. The *potestas* depended upon the *justæ nuptiæ*. The latter in turn upon the *connubium* or right of intermarriage Cf. Gai., i. 56. It would therefore appear at first sight that *connubium* and not *manus* was the necessary condition of *justæ nuptiæ*. It was the one essential in the later law, but this was only after the consensual marriage had become the customary form. It would be a serious error to apply the condition of the law in the time of Gaius, when *manus* had all but disappeared, to marriage under the early Republic.



*Romanorum*.<sup>1</sup> Again, the same difficulty would arise when a Roman citizen married a non-Roman, or a peregrine with whom there happened to be no right of intermarriage. Children born of such marriages could not be *in potestate*,<sup>2</sup> although neither in this case nor in that of marriage between peregrines, nor in case of marriage between Romans without the acquirement of the *manus*, could they be regarded as *vulgo quæsit*i or *fili*i *nul*li*us*. The solution of the problem presented by these unions lacking what had justified the plebeian marriage by *coemptio*, was found in the extension to marriage of another legal concept derived from commercial life, the concept of a contract as it appeared in the course of the law's development. And it is interesting to note in this connection that as a consensual contract was evolved through the *sponsio* and *nexum* from the conveyance *per æs et libram*, so a purely consensual marriage was evolved from the *coemptio* (the name itself implies some sort of mutuality), and ultimately from the same conveyance *per æs et libram*. The extension of the notion of contract to marriage, furthermore, was effected by the same means that developed the new law of contract, the prætorian jurisprudence. A marriage founded upon a mere agreement, when once protection was given to it, *e. g.* by an action for recovery of the *dos* or for adultery, became in essential points similar to a *manus* marriage in the same way that the protection given by the prætor to property in which the owner could not have Quiritarian ownership on account of his status, gave a title to the property of a value and importance equal to the best in the law. And again the rights flowing from a stricter form of marriage were applied to the new form. This free marriage was to enjoy all the benefits of a marriage with *manus* as to legitimacy of offspring. But this new form of marriage, the *communicatio juris humani*, almost disappeared. The wife was not a member of her husband's family, she was not his heir, not being *in loco filiæ*, and remained in the family in which she had been previous to the marriage. Yet the children born of that union were by an extension of the law the children not of their maternal grandfather but of their own father.

The result of this development of the law of marriage and legitimacy whereby the foundation upon which the *patria potestas* and the child's right of succession was changed to keep pace with advancing legal conceptions, was that henceforth in Roman Law

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<sup>1</sup> Gai., i. 108

<sup>2</sup> *Ibid.*, 77.

marriage founded upon a mere agreement was *justæ nuptiæ* and as such sufficient to produce in the case of Roman citizens the *patria potestas* and eventually, when all free persons became Roman citizens, all children born of *justæ nuptiæ* were *filiifamilias*, i. e. were heirs to their father or legitimate. It therefore follows that *pater*, in the sense of one having the *potestas*, *est quem nuptiæ demonstrant*.

The legal conception of legitimacy that took form in the Roman Empire is substantially that obtaining in all modern jurisprudence, for it was admirably adapted by its simplicity to become a universal law. It avoided, on the one hand, the uncertainty of the Semitic system as represented by Hebrew law, in which paternity was always the essential principle, not the existence of a marriage;<sup>1</sup> and on the other hand, the extreme technicality of the Egyptian system, in which the succession was secured to the wife's son by the marriage settlement.<sup>2</sup> But it would be a mistake to conclude that because the Roman connection between legitimacy and birth in lawful marriage has been generally accepted, this has been wholly due to its place in the Civil Law, or that the modern and the Roman notions of legitimacy are based upon identical fundamental ideas. There has intervened between the Civil Law and the systems of modern jurisprudence another legal system which has profoundly influenced certain parts of the law and notably the law of marriage and legitimacy. For by the system of the *Corpus Juris Canonici* the point of view has been materially changed and another foundation laid in place of that which the ingenuity of the Roman lawyers had carefully removed.

The theory of marriage and legitimacy developed by Roman Law had been so completely emptied of its religious significance and so easily expressed in terms derived from the law of property and contract, that it was accepted without the least scruple by the Christian Church.<sup>3</sup> The new religion could regard the moral aspects of marriage, and without coming into conflict with secular law, could regulate the marriages of its own adherents according to its own principles. The Church, even before it had any clear idea of what constituted the sacramentality of marriage, held that marriage was a divine ordinance instituted in Paradise *ad officium*, and as such *proles* was an end of marriage, one of the *tria bona*;

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<sup>1</sup> Cf. Benziger, l. c. Mutterrecht prevailed in some Semitic tribes; cf. W. Robertson Smith, Kinship and Marriage in Early Arabia.

<sup>2</sup> Cf. Revillout, Cours de droit égyptien, p. 41 ff.

<sup>3</sup> Cf. e. g. c. 12, C. 32, qu. 2; c. 15, C. 32, qu. 4; c. un. C. 35, qu. 7.

it was also instituted *ad remedium* and any extra matrimonial relation was deadly sin.<sup>1</sup> Two results followed: first, the Church could not tolerate the legally recognized concubinage except so far as it approximated marriage;<sup>2</sup> secondly, the Church would be forced sooner or later to recognize the *contubernium* of slaves as equivalent morally, or in the eyes of the Church, to the marriage of free persons.<sup>3</sup> Of course the Church could give no legal rights to the offspring of such slave marriages. But it could demand, by spiritual sanctions, the permanency and inviolability of such unions. To these results the Church came, it is true, only after many differences of opinion and much inconsistent legislation, but the principles underlying them are bound up with the teaching of the Church from the very first. Of the two results, the latter was much the more important, for it eventually gave the Church the notion of a perfectly valid marriage without reference to the civil effects which might result from the marriage in respect to the children. By this the Church was able to bring under one principle not only the general rule that only children born of a valid marriage are legitimate, but also the exception to that rule arising from a putative marriage; not only the legitimation by subsequent marriage, but also the exceptions to that rule in the case of *incestuosí* and *adulterini*.

The distinction between a valid marriage, as an indissoluble and inviolable relation, and a marriage that in addition rendered the children born of that union legitimate, was made on a large scale in connection with the Teutonic law of marriage, which in some respects was strikingly like the early Roman law. If marriage was to produce legitimacy, it had to be accompanied by the acquirement of the *mundium*, a tutorial authority corresponding to the *manus* and *potestas* of the Romans. As only the *ingenui*, or free persons, could hold the *mundium*, they alone had "full marriage," as that union has been well called which produced the full effects customary to marriage in the Civil Law. But in the various Barbarian Codes and the secular legislation of the period during which the Canon Law gradually assumed its form, two important modifications appear in this conception of marriage, both

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<sup>1</sup> Cf. St. Augustine, c. 6, C. 32, qu. 2.

<sup>2</sup> Cf. c. 1, D. 33; c. 4, D. 34; c. 11, C. 32, qu. 2, etc. Cf. Penitentie Ecgberte, II. 9, Thorpe, Ancient Laws of England, II. 187, cf. 271.

<sup>3</sup> Cf. Döllinger, Hyppolytus und Calistus, p. 158 ff. See, Ivo, Decret. VIII. 55. Migne, Patrologia Latina, vol. 161; c. 6, C. 29, qu. 2.

of which were in close agreement with the distinction introduced by the ecclesiastically valid marriages. These modifications concerned marriages without *mundium* and marriages between others than *ingenui*. They are closely connected in origin and development. Their places in Gratian's theory of marriage. Their effect much further.

The *mundium* was not essential to a marriage. It was possible for a woman to marry without any contract and such a union was recognized by the law in the barbarian Codes, e. g. among the Visigoths, Lombards, Franks, and Saxons.<sup>1</sup> In not a few contemporary and by many modern writers such unions have been called concubinage, because it resembled the latest form of *concubinitas*, but in the codes they are called marriages. Children born of such marriages enjoyed a right of succession limited, but they had other rights, some very considerable. Concerning the *mundium* of sisters, born in another marriage, Gratian's relation of matters connected with the *mundium* naturally occupies a large part of the space devoted to marriage in the Digest in the same way as the title "Husband and Wife" occupies an entirely different space in a discussion of property rights. But the marriage without *mundium* was always possible, although the more common form was with *mundium*, the contract for the acquisition of which was the betrothal.<sup>4</sup>

Both forms of marriage appear in Gratian's discussion of marriage. The marriage with *mundium*, or that preceded by betrothal, is the form he has in mind in Causa XXVII., *quæstio* 2, when he makes the distinction between *matrimonium initiatum* and *matrimonium perfectum*, the former effected by the *desponsatio*, the latter by the subsequent *copula*.<sup>5</sup> But how far Gratian was from

<sup>1</sup> Cf. Sohm, *Das Recht der Eheschliessung*, p. 51.

<sup>2</sup> Lex Rip. 35, 3; Lex Sax. 40 ff; Ed. Roth. 188; Liutpr. 119; Lex Fris. ix. 11; Lex Visig. iii. 2, 8; Lex Alam. Hloth. c. 52, c. 54. The *matrimonium ad morganaticum* which is generally connected with the *Libri Feudorum* (II. 26, 5) is more properly connected with the marriage without *mundium*, and is in fact an outgrowth of it. Cf. Freisen, *Das Canonische Eherecht*, p. 55 f.

<sup>3</sup> Cf. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 1898, p. 302.

<sup>4</sup> Cf. Habicht, *Altdeutsche Verlobung*, p. 9, 24; v. Scheurl, *Eheschliessung*, p. 112. It should be borne in mind that *mundium* was one thing and the marriage relation something entirely different.

<sup>5</sup> Cf. Dict. ad c. 34, C. 27, qu. 2.

regarding only such marriages as valid is shown by his treatment of marriages lacking the usual formalities. In respect to them he made distinction between *matrimonium legitimum*, or marriage according to the requirements of the secular law, *i. e.* with betrothal, and *matrimonium ratum*, marriage that was indissoluble, *i. e.* a sacrament. A marriage might be *ratum* and not *legitimum*, because contracted *solo affectu*; on the other hand, a marriage, among *infidèles*, might be *legitimum* and not *ratum*.<sup>1</sup> The practical discussion of this is taken up in various places, but especially in connection with clandestine marriage, *i. e.* marriage without betrothal and without witnesses. Although for many reasons such a union ought not to take place, yet it was a valid marriage, and could either party marry again during the lifetime of the other he was guilty of adultery.<sup>2</sup>

In respect to marriage between different classes in the community, the laws and canons again came to much the same result. There were various cases might arise: *e. g.* a marriage between an *inimicus* and an *ancilla*, his own or another's; between an *ingenua* and a *servus*, either her own or another's; between an *aldus* and an *ancilla*. In some of these cases, serious disadvantages attended the union<sup>3</sup> unless they were avoided by special provisions.<sup>4</sup> But they were all regarded as marriage and so described in the law; and the wife, whatever her condition, was styled *uxor*. Although some question arose as to the ecclesiastical validity of these marriages, Gratian's conclusion was followed by the Church. It mattered not whether the free person was the husband<sup>5</sup> or the wife,<sup>6</sup> provided that the free party to the marriage knew the servile condition of the other at the time of the marriage, or, learning it after marriage, had not waived the right of impeaching the marriage by continuing the marital relation. In regard to the marriage of slaves, the early tendency of the Church came at length to a definite termination. Taking his stand upon the broad basis of the equality of all before God and the amenability of all to the same

<sup>1</sup> Cf. Dict. ad c. 17, C. 28, qu. 1.

<sup>2</sup> Cf. Dict. ad c. 11, C. 30, qu. 5.

<sup>3</sup> Cf., *e. g.*, Lex. Sal. 13, 9; 25, 6: see C. Koehne, *Die Geschlechtsverbindungen der Unfreien in fränkischen Reich*, Breslau, 1888.

<sup>4</sup> *E. g.* by *epistolæ conculcatoriæ*; see Rozière, *Recueil général de formules usitées dans l'empire des Francs*, n. 101 ff., 109.

<sup>5</sup> c. 2, C. 29, qu. 2.

<sup>6</sup> c. 5, qu. cit.

law, Gratian<sup>1</sup> proves not only that slaves might marry, but that even if they belonged to different persons their marriage was indissoluble. But the condition on which they might marry was the consent of their respective masters.<sup>2</sup> What their status would have been without that consent is not clear, for the canon of the Council of Châlons (A. D. 813), on which Gratian here relies, is directed against the *domini* rather than against the *servi*. But the tendency of the law was toward making the marriage indissoluble irrespective of the will of the *dominus*, *i. e. matrimonium ratum*,<sup>3</sup> and Adrian IV. (A. D. 1154-1159) soon after declared the consent of the *dominus* wholly unessential.<sup>4</sup> This opinion after some hesitation was received<sup>5</sup> and became law. The recognition of the unconditional validity of the marriage of slaves, a matter which had fallen to the ecclesiastical jurisdiction, was due to the theological treatment of the whole subject of marriage and the new theory of the sacraments. Marriage was looked at principally from the point of view of a sacrament, and as such wholly independent of conditions introduced by secular law.<sup>6</sup>

When the Church recognized the validity of marriage contracted by mere consent and without reference to the civil status of the parties, it did not touch the matter of legitimacy or give any rights of succession to children born of such unions. That was a matter of secular law, and consequently Gratian mentions legitimacy only incidentally. But in the course of the long struggle over clerical marriage, the Church created for herself a species of legitimacy, *quoad spiritualia*, which was entirely within its competency. By a canon of the Council of Poitiers (A. D. 1078)<sup>7</sup> birth in a valid marriage was necessary for preferment to any ecclesiastical benefice or

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<sup>1</sup> c. 1, qu. cit.

<sup>2</sup> c. 8, qu. cit.

<sup>3</sup> Cf. Pet. Lomb. Sent. IV. D. 36, written at almost the same time as Gratian's Decretum.

<sup>4</sup> c. 1, X. 4, 9, Jaffé, n. 7068.

<sup>5</sup> Bernardus Papiensis includes this decretal in his *Compilatio Prima*; cf. his *Summa Decretalium*, ed. Laspeyres, p. 154, and his *Summa de matrimonio*, printed as an appendix to the *Summa Decretalium*, p. 294.

<sup>6</sup> In the words of Adrian, "*Sane justa verbum apostoli sicut in Cristo Jesu, neque liber neque servus est qui a sacramentis ecclesiae sit removendus, ita quoque nec inter servos matrimonia debent ullatenus prohiberi.*" A somewhat different line of argument and even more in harmony with the theological method of the time is given by Paucapalea (*Summa*, ed. Schulte, p. 119), "*Valde majus atque dignius est conjugium Christi et ecclesiae, quam viri et mulieris matrimonium. A tali vero conjugio neminem repellit servilis conditio.*"

<sup>7</sup> c. 1, X. 1, 17.

even for ordination except in the case of regulars.<sup>1</sup> In this way the incontinent clergy were to be punished by making a new disability arise from bastardy, and the danger of converting ecclesiastical benefices into family property was to be prevented. For the son might not succeed his father in the same benefice.<sup>2</sup> Having a species of legitimacy of its own, and possessing everywhere jurisdiction in matrimonial causes,<sup>3</sup> with which legitimacy was closely connected, there was always a tendency to extend the ecclesiastical jurisdiction to matters purely secular. A new title appeared in the *Compiatio Prima*,<sup>4</sup> "*Qui filii sint legitimi*," and reappeared in subsequent private and official collections. The reasoning was very natural; since *spiritualia* were superior to *temporalia*, *legimitas quoad spiritualia*, which certainly belonged to the Church to determine, ought to include *legimitas quoad temporalia*,<sup>5</sup> and papal legislation be as binding in one case as the other. Then again, in as much as the validity of a marriage in case of an impediment depended on an ecclesiastical dispensation, and legitimacy in the secular law was confessedly the result of birth in a valid marriage, except in the case of the children of slaves,<sup>6</sup> it was not unnatural to claim authority in matters of legitimacy<sup>7</sup> as much as in matters of marriage.<sup>8</sup>

The theory of legitimacy which underlies the Canon Law and the ecclesiastical legislation appears clearly in the origin of the legitimacy *quoad spiritualia*. It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children's disabilities more effectively than in themselves.<sup>9</sup>

<sup>1</sup> The *defectus natalium legitimorum* was originally only a special case of *defectus famæ*. It had appeared earlier (*cf.* Regino, *De synodalibus causis*, I. 427-429; Migne *Patrol. Lat.*, vol. 132), but it produced at the time no great effect upon the law of the Church.

<sup>2</sup> *Cf.* cc. 2-4, 7-13, X. 1, 17.

<sup>3</sup> *Cf.* Esmein, *Le mariage en droit canonique*, I. p. 25 ff.

<sup>4</sup> *Cf.* *Quinque compilationes antiquæ*, ed. Friedberg, p. 51.

<sup>5</sup> *Cf.* c. 13, X. 4, 17.

<sup>6</sup> Here the illegitimacy was both *quoad spiritualia* and *temporalia*. *Cf.* Hostiensis, *op. cit.* p. 1094. This apparent inconsistency in the Canon Law was probably due to the old principle that prevented the ordination of slaves (*cf.* Dist. 54; X. *de servis non ordinandis*, 1, 18).

<sup>7</sup> c. 5, 7, X. 4, 17.

<sup>8</sup> For the opinion current among pre-Reformation English ecclesiastical lawyers as to the relation between secular and ecclesiastical legislation, see Lyndwood, *Provinciale*, p. 257, gl. ad v. *canones præcipiunt*.

<sup>9</sup> Hostiensis, *op. cit.* ad X. i. 17, p. 180, *magis puniuntur parentes in filiis, quam in semet ipsis*. Hostiensis finds precedents for this theory of legitimacy in C. 9, 8, 5, 1; 1,



In the case of illegitimacy *quoad spiritualia* the reasons, *timor paternæ incontinentiæ*<sup>1</sup> and the di hood.<sup>2</sup> But these reasons merely enforce the po was a privilege arbitrarily attached to a valid m: not found in the mere idea of marriage. And case of putative marriage that reason, except in case of *filiî presbyterorum*, was wholly the in which the Church naturally took. Another the course of the speculations of the canonists, that band is the *dominus ventris*, therefore his childre born of his wife.<sup>3</sup> But this theory does not ap the slightest influence upon the actual legislat and is no more than one of the many speculation of the law.

As a consequence of the principle that legit an encouragement to virtue, it followed that w *dolus* there ought to be no punishment, and a m good faith, but invalid on account of some imp to the parties, conferred legitimacy on the child or conceived before sentence of divorce was pro the marriage had been contracted *in facie eccl* scribed solemnities. The object of this provi assurance of good faith. Banns were to be pub incestuous or otherwise invalid unions.<sup>4</sup> Any i be made known to the proper authorities. If the parties contracted without the banns, although the marriage was not rendered invalid by the mere omission, yet if it should be proved invalid, there was strong presumption of *ma'la fides*. Hence the rule, "*Legitimus filius est qui de legitimo matrimonio est natus, vel de eo quod in facie ecclesie legitimum reputatur, quamvis in veritate matrimo- nium non fuit.*"<sup>5</sup> But the *bona fides* need not be present in the

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5, 4, 6, and is followed by Panormitanus, *op. cit.* I 55 b, and other canonists generally. Blackstone, 4 Comm. 382 f., reasons in much the same way in connection with forfeiture of property for treason and corruption of blood.

<sup>1</sup> Hostiensis, l. c., c. 14, X. 1, 17; Dict. ad c. 1, D. 56. Gratian relies upon this reason to remove the apparent injustice of the rule; *cf.* c. 3 ff.; D. 56.

<sup>2</sup> See *supra*. *Cf.* Rubr. c. 14, X. 5, 33.

<sup>3</sup> *Cf.* Hostiensis, *op. cit.* p. 1097.

<sup>4</sup> c. 3, X. 4, 3.

<sup>5</sup> It should be borne in mind that *copula illicita* gave rise to affinity.

<sup>6</sup> Tancred. *op. cit.* p. 104; Bernard. Pap., Summa decret. p. 182; *cf.* Roland. Summa, ed. Thaner, p. 231, f; c. 5, X. 4, 2; c. 3, X. 4, 3; c. 2, 15, X. 4, 17.



use of both parties, for it was sufficient according to the canons<sup>1</sup> that the woman act in good faith. The children so born were legitimate in respect to both parents. If they had been legitimately only in respect to the party acting in good faith, there would still be a partial illegitimacy. This rule for which a precedent had been found in the Civil Law<sup>2</sup> appeared first in the *Compilatio tertia*<sup>3</sup> and was soon extended to apply to either party, and merely carried further the principle on which legitimacy was based by the Church. The comment of Panormitanus illustrates this, for he notes that the *bona fides* must exist *tempore conceptionis filii*, and not merely *tempore contractus matrimonii*.<sup>4</sup> For when once the impediment becomes known there is *in foro conscientiae*, at least, no marriage, and the relation for the person to whom the impediment is known at once becomes sin.<sup>5</sup>

If legitimacy is merely a privilege which the law attaches to a valid marriage or a putative marriage, for the sake of upholding morality, and is not founded upon some property right or connected with such, it is easy for the law to give the same privileges in other cases in which the cause of morality might be advanced. Such a case would arise if, for the sake of benefit to children, an illicit could be converted into a valid marriage. Hence, *legitimationo per subsequens matrimonium*. Here, as in so many other parts of the Canon Law, the legislation was not without precedents. What closely resembled this form of legitimation appeared not merely in the Civil Law but in the Barbarian Codes in the acquirement of the *mundium* after marriage with its consequent effects. It is, however, in the former system that the canonists found the legal justification for their rather broad interpretation. By that law only *liberi naturales*, i. e. children born of a lawful concubine, could be legitimated by subsequent marriage of parents, and special formalities were required in connection with the marriage. In the development of the law, the concubinate as an institution disappeared. The concubine became either a wife from whose marriage not all the civil rights of marriage resulted, or she was a mere mistress. But the former lived in a union that

<sup>1</sup> c. 14, X. 4, 17, cf. c. 8, eod. tit.

<sup>2</sup> D. 23, 2, 57 a.

<sup>3</sup> Friedberg, *op. cit.* p. 128.

<sup>4</sup> *Op. cit.* ad c. 14, X. 4, 17, IV. p. 44 b.

<sup>5</sup> On putative marriage and legitimacy in England, cf. Bracton, *De legibus*, f. 63, who refers to Tancred and the Decretals; cf. Glanville vi. 17

was the sacrament of marriage; the latter lived in fornication.<sup>1</sup> There was, therefore, no reason for making the distinction of the Civil Law whereby only certain children born *ex soluto et soluta*<sup>2</sup> might be legitimated. The concubinate derived no justification from its resembling marriage in that it was a more or less permanent relation, in fact, according to some it was, for that very reason, all the more reprehensible.<sup>3</sup> It was, therefore, not going beyond the example set by the Civil Law, if the privilege of legitimation should be extended by canon to all born of an illicit union, provided that the only fault in the relation was the want of wedlock. But such a privilege should not be allowed in case of *spurii, incestuosi, or adulterini*. For this reason the decretal *Tanta est vis*<sup>4</sup> expressly excepted such from its operation. The principle according to which this exception was made, *quoniam matrimonium legitimum inter se contrahere non potuerunt*, was omitted by Raymund of Pennaforte in his revision of the decretals. It has, nevertheless, played a very important part in all canonical discussions.

The decretal *Tanta est vis* introduced no new principle of legitimation, but merely excluded *adulterini* from the benefits of the law. The Church in making this exclusion was entirely within its own right so far as *legitimitas quoad spiritualia*. But no limitation appears in the decretal referred to. Legitimacy is there taken quite generally as if there was no distinction between the two kinds. But when the Church appears in its own authority insisting that legitimation by subsequent marriage was valid *quoad hereditatem*,<sup>5</sup> there is the appearance of opposition to what was at least becoming law, if not already such.

A conflict with the temporal authorities was inevitable wherever the law of legitimacy had been changed from the older form.<sup>6</sup> In England where this was the case and the change in the law had taken place about the time of the decretal *Tanta est vis*,<sup>7</sup> the result was

<sup>1</sup> Cf. c. 6, X. 1, 21; St. Thom. Aq. Summa Theol., Suppl. qu. 65, art. 3.

<sup>2</sup> Cf. Rubr. c. 1, X. 4, 17.

<sup>3</sup> Cf. Panormitanus, IV. p. 40 b.

<sup>4</sup> C. 6, X. 4, 17.

<sup>5</sup> C. 1, X. eod. tit., A. D. 1180.

<sup>6</sup> Cf. Schröder, *op. cit.* p. 61, 694; Selden, Diss. ad Fletam, p. 538.

<sup>7</sup> Cf. the correspondence between Grosseteste and William de Raleigh. Rer. Brit. Scr., vol. 25, p. 89, 96. See also Libri Feudorum, II. 26, § 4, in which this form of legitimation is disallowed. The date of this portion of the Libri Feudorum, according to Laspeyres, Über die Entstehung und Älteste Bearbeitung der Libri Feudorum,

the Statute of Merton,<sup>1</sup> by which the change in the English law was made permanent in opposition to the Church.<sup>2</sup> That the law of the Church continued to be followed by the Church's courts is certain, not merely from the fact that the difficulty with these courts continued in spite of the Statute of Merton, and only ended by taking from the Church's courts the possibility of applying their law,<sup>3</sup> but also from the testimony of Bracton<sup>4</sup> and of Coke.<sup>5</sup> Only legitimacy *quoad spiritualia* was left to the decision of the Church's Courts; there the ecclesiastical law was still applied.<sup>6</sup>

Why was there this opposition to legitimacy based upon a subsequent marriage? Was there a new theory of legitimacy? It does not seem to be so explained. The rejection of this form of legitimation seems to have been due to a question of prudence, and should be taken with the hesitation to recognize the legitimacy of the offspring of clandestine marriages.<sup>7</sup> It was not because such marriages were not valid, for of that the King's Courts had nothing to say. Marriage was a sacrament, and it belonged to the Church to say when the conditions of a sacrament were present. But such marriages were altogether uncertain. In the same way not a few legitimations by subsequent marriage were on deathbeds, under circumstances involving suspicion. To avoid all dispute, the courts cut off the whole class of doubtful marriages as giving rise to legitimacy. But there was no new theory of

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Berlin, 1830, p. 200 ff., is about 1160. The decretal *Tanta est vis* (A. D. 1172) is addressed to the Bishop of Exeter, and therefore there may be special connection with the change in the English law.

<sup>1</sup> 20 Henry III. (1235-6) c. 8.

<sup>2</sup> The well-known account of the Statute of Merton has been repeated in almost every discussion on legitimacy or the place of the Canon Law in England, to show that the Canon Law was not binding in England, or not binding *proprio vigore*. It merely shows that in the King's Courts it was not recognized in all its parts. But it says nothing as to its force in the Ecclesiastical Courts where it was administered. A line of reasoning similar to that generally based upon the Statute of Merton would show that the Canon Law was nowhere in Europe in force *proprio vigore*, except in the Patrimony of St. Peter.

<sup>3</sup> Cf. Bracton, *op. cit.* 416, a, f; Fleta, vi. 16.

<sup>4</sup> *Op. cit.* f. 62.

<sup>5</sup> Coke on Littleton, p. 245. *Matrimonium subsequens legitimos facit quoad sacerdotium non quoad successionem propter consuetudinem regni quod se habet in contrarium.*

<sup>6</sup> In Germany the legitimation *per subsequens matrimonium* met with some opposition (cf. Schwabenspiegel, c. 377; Sachsenspiegel, I. 27), due, as in England, to the new feudal law. But here, as probably everywhere else except in England, it eventually prevailed.

<sup>7</sup> Cf. Bracton, *op. cit.* 92 a, *non valeant clandestina conjugia haeredibus quoad successionem.*

legitimacy in this, any more than there was of marriage.<sup>1</sup> The theory that still underlay the law, secular as well as ecclesiastical, was the moral advantages arising from conferring benefits upon the offspring of marriage. The extreme to which the Common Law carried the principle that marriage should precede birth, even by ever so short an interval, is the result of this very theory, and may be regarded as a sort of compromise between what was felt to be natural justice and what the jealousy of the Church's law prompted.

It is interesting to observe that in those points in which the English Common Law long refused to accept the more equitable provisions of the Canon Law, the law of other English-speaking countries, notably the United States, has by statute carried even further, in not a few instances, the principles of the Canon Law.

*Joseph Cullen Ayer, Jr.*

SANDWICH, MASS., September, 1902.

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<sup>1</sup> Cf. Pollock and Maitland, *Hist. of English Law*, II. p. 373 ff.

## CONTRACTS FOR THE BENEFIT OF A THIRD PERSON IN THE CIVIL LAW.

THE confusion in our law as to the rights of a third person interested in the performance of a contract, and the fact that the same legal problem exists in the civil law, gives interest to an examination of the solutions offered by civilians to the difficulties of the case. The following translations give at least some idea of the results which have been reached.<sup>1</sup> The first translation may serve as a statement of the law apart from the particular provisions of the codes. Translations of some of those provisions then follow.

DERNBURG, PANDEKTEN. II. § 18, 5th ed.

Contracts are said to be "for the benefit of third persons" when the contractor stipulates for performances to be rendered to a third person, so that the latter also may enforce the contract at law.

The older Roman law simply refused to allow such contracts. The promisee could not sue because non-performance of the contract caused him no pecuniary damage, which was regarded as necessary to give rise to a right of action. Nor could the third person, because he was not a party to the contract.

This rule, however, suffered essential modifications in the later Roman law, and to-day the rule is different.

1. Even in Rome the promisee was allowed a right to sue for the performance to the third person, if he had an indirect pecuniary interest, if, for example, he had stipulated for the payment of his debt to his creditor. In the case of *bonae fidei judicia*, the law went still further. In the modern law, however, a non-pecuniary interest is universally sufficient to give the promisee a right of action, for example, if a manufacturer stipulates that performances of pecuniary value shall be rendered to the poor.

2. Even in Rome the third person was allowed in many cases an *actio utilis* in order to compel performance for himself. Espe-

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<sup>1</sup> The leading foreign textbooks on the subject are Gareis, *Verträge zu Gunsten Dritter*, Würzburg (1873); Hellwig, *Verträge auf Leistung an Dritte*, Leipzig (1899); Pacchioni, *Contratti a Favore di Terzi*, Innsbruck (1898). The last-named book contains, pp. 130-139, a full bibliography of the subject.

cially if a donor had imposed as a duty on the donee at the time a gift was made, the delivery of the gift or some other performance to a third person.

Also contracts for performances to the heirs of the promisee or to one of his heirs, which were not enforceable in the classical law, were given full effect by Justinian.

According to modern common (*i. e.* non-statutory) law the third person is entitled to sue independently on contracts for his benefit, so far as this was intended in the contract.

(*a*) In consequence, the difficult question arises, When is the third person one merely appointed to receive performance, but not entitled to sue, and when may he maintain an action on his own behalf? The contracting parties themselves almost never make express statement of their intention. The judge has therefore no other resource than to consider the object of the contract and the intent of the parties as derived from that. His task is lightened by the fact that the right of the third person has by custom been established in certain kinds of contracts. This is the case in contracts for the transfer of property in which the grantor stipulates for settlements in favor of his children or wife or others standing near to him. Further, in the case of life insurance in favor of a third person.

Also the consignee named in a bill of lading of freight has by statute<sup>1</sup> a right of action for the delivery of the goods when the carrier has arrived at the place of delivery and has given the bill of lading to the consignee. In the case of matter sent by post the person addressed has, on the contrary, no right of action for its delivery.

(*b*) Further it is doubtful if, and until what moment the provision for the benefit of the third person can be rescinded without his concurrence. In regard to this inquiry also it is necessary to consider the particular kind of contract that is in question. Life insurance for the benefit of a third person the insured may, while he lives, destroy or transfer to others. The same is true in regard to settlements contracted for on transfers of property. The right of the consignee designated in a bill of lading to the goods is fixed as soon as the carrier has delivered the bill of lading to him after the arrival of the goods at the place of delivery.

(*c*) The right of action of the third person is rooted in the contract, is dependent on its validity, and is subject to the modifica-

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<sup>1</sup> Handelsgesetzbuch, Art. 402, 405.

tions which the contracting parties make with reference to the provisions of the contract before the right of the third person has become irrevocable.

Yet it is an independent right, not simply the assigned claim of the promisee. Therefore, for instance, the consignee of a bill of lading in case the goods are not delivered can recover not only the damages of the consignor, but also his own.

Many claim that the third person is only entitled to enforce the right of the promisee; that his action is an *actio utilis*, that is, that of the promisee (*e. g.* Bähr). The true view is, however, that the third person enforces his own right arising from the contract. Hence he is not subject to defences of set-off arising out of other matters, to which the promisee is liable. But his right of action arises from the contract. He can, therefore, not escape defences arising from it, for example, the *exceptio non adimpleti contractus*.

GERMANY. — *Bürgerliches Gesetzbuch*.

Second Book, Second Division, Third Title. — *Promises of Performance to a Third Person*.

§ 328. A performance to a third person can be stipulated for by contract with the effect that the third person acquires a direct right to claim the performance.

If there is no definite expression of intention it is to be gathered from circumstances, especially the purpose of the contract, whether the third person acquires the right, whether the right of the third person is to arise immediately or only under certain conditions, and whether the right is reserved to the contracting parties of destroying or altering the right of the third person without his assent.

§ 329. If one party to a contract binds himself to satisfy a creditor of the other party without assuming the debt, in case of doubt it is not to be presumed that the creditor acquires the right to claim the satisfaction from him.

§ 330. If, in a contract of life insurance or for an annuity, the payment of the insurance or of the annuity is stipulated to be made to a third person, in case of doubt it is to be presumed that the third person acquires a direct right to demand the performance. The same is true when, on a gratuitous delivery to the care of another, an obligation of performance to a third person is imposed; or when, in case of a transfer of property or estate a performance



to a third person for the purpose of a settlement is promised by the grantee.

§ 331. If the performance to the third person is to ensue upon the death of the promisee, the third person acquires the right, in case of doubt, on the death of the promisee.

If the promisee dies before the birth of the third person, the promise to perform to the latter cannot be destroyed or altered unless that right has been reserved.

§ 332. If the promisee has reserved the right to substitute, without the assent of the promisor, another beneficiary in the place of the one designated in the contract, this may be done, in case of doubt, by testamentary disposition.

§ 333. If the third person rejects the right against the promisor acquired by the contract, the right shall be regarded as not acquired.

§ 334. Defences arising out of the contract are available to the promisor against the third person.

§ 335. So far as a contrary intention of the contracting parties is not to be inferred the promisee can enforce performance in favor of the third person, although the latter has the right to the performance.

#### Fifth Division. — *Assumption of Debts.*

§ 414. A debt can be assumed by a third person by contract with the creditor, so that the third person takes the place of the previous debtor.

§ 415. If the assumption of the debt is agreed upon by the third person and the debtor, the effect depends on the acceptance of the creditor. The acceptance can take place only after the debtor or the third person has notified the creditor that the debt has been assumed. Until acceptance the parties to the contract can alter or rescind it.

If acceptance is refused, the debt is to be regarded as not assumed. If the debtor or the third person demand of the creditor a declaration within a fixed limit of time, whether he accepts, the acceptance can be expressed only within that time. If not expressed it is to be regarded as refused.

So long as the creditor has not communicated his acceptance, the one assuming the debt is, in case of doubt, to be regarded as liable to the debtor to satisfy the creditor at the proper time. The same is true if the creditor refuses his assent.



§ 416. If the purchaser of real estate assumes by contract with the grantor a debt of the grantor which is secured by a mortgage of the real estate, the creditor can accept the assumption only if notified by the grantor. If six months have elapsed since the receipt of the notice, the acceptance is to be regarded as given, unless the creditor has previously notified the grantor of his refusal. The provisions of § 415, ¶ 2, sentence 2, are not applicable.

The notice of the grantor can be given only after the purchaser has been entered as owner in the registry of deeds. The notice must be given in writing and must contain the statement that the purchaser has assumed the place of the previous debtor unless the creditor expresses his refusal within six months.

The grantor must when requested by the purchaser notify the creditor of the assumption of the debt. As soon as the giving or refusing of acceptance is settled the grantor must notify the purchaser.

§ 417. The one who assumes the debt can set up against the creditor the defences which arise out of the legal relation between the creditor and the previous debtor. A claim belonging to the previous debtor cannot be set off.

The one who assumes the debt cannot set up against the creditor defences arising from the legal relations between himself and the previous debtor, upon which the assumption of the debt was based.

§ 418 In consequence of the assumption of a debt the sureties and pledges for it are released. If the claim is secured by a mortgage the effect is the same as if the creditor had renounced the mortgage. These provisions do not apply if the surety or he to whom the pledged property belongs at the time of the assumption of the debt assents to such assumption.

A right of priority in bankruptcy belonging to the claim cannot be made effective in bankruptcy as against the property of the one who assumes the debt.

§ 419. If any one acquires by contract the property of another, the latter's creditors can, without prejudice to the continuance of the liability of the previous debtor, enforce against the grantee also, from the formation of the contract, the claims which they had at that time.

The obligations of the grantee are limited to the amount of the granted property and the rights belonging to him by virtue of the contract. If the grantee sets up the limitation of his liability

the provisions of §§ 1990, 1991 with reference to the liability of heirs are applicable.

The obligation of the grantee cannot be excluded or limited by agreement between him and the previous debtor.

SWITZERLAND. — *Code Fédéral des Obligations*.

§ 128. One who, acting in his own name, has stipulated for an obligation in favor of a third person, has the right to enforce performance for the benefit of the third person.

The third person, or his successors in interest, can also personally demand performance when such was the intention of the parties. In such a case, if the third person notifies the debtor that he wishes to exercise the right, the creditor cannot afterwards release the debtor.

FRANCE. — *Code Civil*.

Art. 1119. No one can in general bind himself or stipulate in his own name, except for himself.

Art. 1121. A party may likewise stipulate for the benefit of a third person when such is the condition of a stipulation that he makes for himself, or of a donation that he makes to another. He who has made this stipulation can no longer revoke it if the third person has declared his wish to take advantage of it.

Art. 1165. Contracts have no effect except between the contracting parties. They do not impose liability upon a third person, and they do not give him any rights except in the case covered by Art. 1121.

Art. 1166. Nevertheless creditors can make use of all the rights and actions of their debtor except those which are wholly personal.<sup>1</sup>

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<sup>1</sup> The French Code has had a wide influence upon the legislation of the Latin countries of Europe and America. A few countries have directly copied from the sections here translated :

BELGIUM. — *Code Civil*.

The French Code is in force.

HOLLAND. — *Burgerlijk Wetboek* (the French translation of G. Tripels has been used).

Articles 1351, 1353, 1376, 1377 are translations of the articles of the French Code given above.

ITALY. — *Codice Civile*.

Articles 1128-1130 are translations of Articles 1119, 1121, 1165 of the French Code.

UPPER CANADA. — *Civil Code*.

Articles 1029 and 1031 are translations of Articles 1121 and 1166 of the French Code.

LOUISIANA. — *Civil Code*.

Art. 1890. A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

SPAIN. — *Codigo Civil*.

Art. 1257. Contracts only have effect between the parties who made them, and their heirs. . . .

If the contract contained any stipulation in favor of a third person, the latter may exact its fulfilment provided that he has made known his acceptance to the obligor, before revocation by him.

PORTUGAL. — *Codigo Civil*.

There is no provision on the subject.

MEXICO. — *Codigo Civil*.

Art. 1277. Contracts bind only the parties to them.

BRAZIL. — *Codigo Civil*.

Art. 1957. Contracts neither injure nor benefit third persons (except in the following cases). . . . They only benefit such persons when they are made in favor of a third person, and he expressly or tacitly accepts them.

ARGENTINE REPUBLIC. — *Codigo Civil*.

Art. 1196. Unless forbidden creditors can make use of all rights and actions of their debtor, except such as are personal.

Art. 1199. Contracts cannot be set up against third persons, nor taken advantage of by them, except in the cases of articles 1161 and 1162. (These articles relate only to cases of agency.)

URUGUAY. — *Codigo Civil*.

Art. 1230. If any one, contracting in his own name, has stipulated for any benefit in favor of a third person, and has no authority to represent him, such third person can exact the fulfilment of the obligation, if he has accepted it and has notified the obligor thereof, before revocation.

Art. 1267. Contracts cannot be set up against third persons, nor taken advantage of by them, except in the cases of articles 1228 to 1230.

PERU. — *Codigo Civil*.

Art. 1259. . . . A contract may be made in favor of a third person, even without his consent.

In this last case the contracting parties are not free to rescind the contract if the third person has accepted the stipulation.

Art. 1261. The creditors of a person who has rights acquired under a contract may be authorized to enforce them, unless the debtor is entitled to delay in making payment of his debt.

JAPAN. — *Civil Code*.

Art. 537. If one of the parties bind himself by the contract to make some payment to a third person, the latter is entitled to demand such payment direct from the debtor.

The right of the third person under the circumstances mentioned in the preceding clause is created when he expresses to the debtor his intention to enjoy the benefit accruing to him from the contract.

Art. 538. After the right of the third person has in accordance with the provisions of the preceding article been created, the parties to the contract can neither change nor extinguish it.

Art. 539. A defence which is based on a contract such as that mentioned in Article 537, may be set up by the debtor against the third person who will benefit by the contract.

The main deductions warranted by these extracts from foreign codes may be briefly summarized. It is very instructive to observe that, although the Roman Law refused to recognize any legal right in the beneficiary of a contract, the modern civil law almost universally gives him a direct remedy. As this result was in violation of what had formerly been the law, it is a strong indication that there is a real necessity for the relief of the beneficiary. It must not be thought, however, that the term "beneficiary" necessarily includes a creditor whose debtor has been given a promise to pay the debt, though it certainly does sometimes. Such a creditor was allowed in the Roman Law an *actio utilis*, that is, an action to enforce a right of his debtor. In the French and some of the other codes the creditor is given such an action, so that if he has

no right of his own, he is entitled to satisfy his claim by enforcing on behalf of his debtor the latter's right of action. It is possible that even where codes make no express provision for such a remedy, it is nevertheless allowed.

The selections from the German Code deserve particular attention, because that code is the most recent and the most carefully considered of the codes, and the subject is more elaborately treated there than in any other code. The fundamental idea of the German legislators was evidently to give effect to the intention of the contracting parties. If they intended the third person should have a right of action, he is to have it. As such intentions are frequently not expressed, the code gives some rules to be applied in cases where the intention is doubtful. The Swiss Code, also, makes intention the governing fact. The sections of the German Code on the assumption of debts provide a useful means for fixing, so that they cannot be mistaken, a creditor's rights when the debt due him has been assumed by a third person. If the creditor, when notified, assents to the arrangement, there is a novation, and his only right is against his new debtor. If he does not assent, his only direct right is against his original debtor, but the latter has a right against the one who assumed the debt.

*Samuel Williston.*

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THE LAW SCHOOL. — The building of the proposed addition to Austin Hall has been indefinitely postponed because of the considerable advance in the cost of materials.

The changes in the curriculum are more numerous this year than usual, in consequence of the absence of Professor Beale and Professor Strobel, and the assumption by Professor Gray of the courses formerly given by Professor Thayer. Evidence and Constitutional Law — the latter being given only as a two hour course — are in charge of Professor Gray, who has consequently been obliged to renounce all work in the Property courses. By special request of the students he will continue to give the lecture course upon Comparative Jurisprudence. Assistant Professor Westengard has taken Professor Gray's place in Property III. He also gives Property II. and Property I. with Mr. Bruce Wyman as assistant in the former course, and Mr. Edward B. Adams, LL.B., 1897, in the latter. Dean Ames has again taken the course in Pleading, which was last year under the charge of Assistant Professor Westengard. A new book of cases for use in the course is being prepared. The work in the second year course on Jurisprudence and Procedure in Equity will be shared by Dean Ames and Professor Beale, who will return from Chicago for the second half of the year. An advanced course on the same subject under the Dean's instruction is offered for the second half-year. During Professor Beale's absence Mr. Wyman will give one hour a week to Conflict of Laws; the latter half of the course will consist of three hours a week under Professor Beale. Mr. Wyman has also undertaken the course on Carriers, which will be one hour a week throughout the year. A new case book entitled "Cases on Public Service Companies," compiled by Professor Beale and Mr. Wyman, will be used. The first half of the course on Criminal Law will be

in the entire charge of Mr. Peabody ; Professor Beale will, as usual, give the latter half. Professor Wambaugh's course on Contracts and Quasi-Contracts has been divided into two half-courses. Professor Strobel's absence in Europe on account of ill-health has necessitated the discontinuance of the course on International Law and the lectures on the Civil Law of Spain and the Spanish Colonies. Dean Ames has consented to give the course on Admiralty which Professor Strobel had expected to teach. Two new lecture courses are offered : one dealing with Mining Law, to be given by Charles J. Hughes, Jr., of Denver, Colorado ; the other, by Mr. Adams, treating of the Law of Irrigation.

The enrollment in the school on October fifteenth was slightly greater than on the same date last year. Complete statistics will appear in the December number.

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**PRIORITY OF RAILROAD RECEIVERS' CERTIFICATES OVER EXISTING MORTGAGES.** — The power of courts of equity to authorize railroad receivers to issue certificates having priority over existing mortgages is now well established. *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89 ; *Bank of Commerce v. Central Coal & Coke Co.*, 115 Fed. Rep. 878 (C. C. A., Eighth Circ.) The limits of that power, however, have not yet been fixed, and there has been an alarming tendency to juggle interests and rights without due regard for the bondholders. The decision of a recent case emphasizing the need of caution in the exercise of this extraordinary right is a welcome check. Certificates were issued to complete a road only one-third built, and later a second series was issued with priority over the first, the result being sure loss to the first mortgagees and only conjectural benefit to the other creditors. The Court of Appeals, in reversing the ruling of the lower court, well said, "The appointment of a receiver vested in the court no absolute power over the property, and no general authority to displace vested contract liens." *Bibber-White Co. v. White River, etc., Co.*, 115 Fed. Rep. 786 (C. C. A., Second Circ.).

The subordination of existing mortgages and prior liens to liens for running expenses is justified under the plea of necessity rather than defended on principle. The argument is twofold. The peculiar nature of the corporate business makes it imperative that the railroad should be kept running if the property is to be preserved. Loans for this purpose can be secured only by granting priority of lien, and thus this power, though dangerous, is necessary for the ultimate protection of even the bondholders. The same reasoning shows that the stockholders and the other creditors will often have to depend on such action by the court as their only hope of relief. Again it is urged that the court in charge of the railroad must continue it in operation to enable it to fulfill its obligations to the public. It would seem that both these reasons, or at least the first, should exist in any given case before the vested rights of the mortgagees should be displaced. It is on the element of public duty, however, that the chief emphasis has been laid, and consequently the doctrine has not been applied to private corporations owing no such duty. *Baltimore, etc., v. Alderson*, 32 C. C. A. 542. On the other hand, probable loss to the mortgagees has not always been thought a fatal objection when the public welfare was concerned. *Ellis v. Vernon Ice, etc., Co.*, 4 Tex. Civ. App. 66 ; see 7 HARV. L. REV. 375. The arguments based on the interest of the public and on the probable ultimate benefit of all the



parties interested lead on to an indefinite extension of the doctrine, and the danger lies in the lack of a fixed limit. This is shown in cases where the courts have considered it their duty to complete unfinished roads. *Mittenberger v. Logansport Ry. Co.*, 106 U. S. 286. The action of the lower court in the principal case is the most extreme instance of this danger. It is conceded that the bondholders have a right to be notified so that they may appear and argue against the issue of the certificates. But that precaution helps little if the test is to be not their interest but that of the public. It is claimed that in extending credit to the railroad they have taken the risk of the issue of certificates with the consequent postponement of their liens. But it is unjust to force them to take the chance of arbitrary action. The question before the court in each case should be not a balancing of benefits to see whether the gains will be greater than the losses to all concerned treating all on an equal footing, but whether the probable protection of the bondholders and the benefit to the other interested parties and to the public require and justify interference with vested rights otherwise sacred.

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DISTRIBUTION BETWEEN LIFE-TENANT AND REMAINDERMAN. — A difficult question as to distribution arises, if, when shares of a corporation are held in trust for a life-tenant and remainderman, the corporation instead of declaring dividends lays its earnings by in the form of a surplus. In a recent Mississippi case, bank shares were sold by a trustee at a price enhanced by the existence of a large surplus accumulated from profits earned subsequently to the creation of the trust. The court gave the life-tenant the increase in price due to such surplus. *Simpson v. Millsaps*, 31 So. Rep. 912.

In the cases hitherto decided the fund for distribution had generally been received by the trustee in the form of a cash bonus or a stock dividend; but an adoption of any of the theories advanced in those cases will settle the question, no matter in what form the fund may have come to the trustee. There may be said to be three views as to distribution. (1) The so-called "Massachusetts" view treats cash dividends as "income," regardless of when the earnings were made, provided the declaration of the dividend comes during the life tenancy; stock dividends it regards as "corpus" to which the remainderman is consequently entitled. *Minot v. Paine*, 99 Mass. 101; *In re Barton's Trust*, L. R. 5 Eq. 238; *Gibbons v. Mahon*, 136 U. S. 549. An exception to the first part of this rule is made when it appears that the cash dividend resulted from other sources than actual earnings; such a dividend goes to the remainderman. *Heard v. Eldrige*, 109 Mass. 258. (2) The New York and Kentucky view gives to the life-tenant all dividends, whether stock or cash, issuing from earnings, whenever such earnings may have accrued, provided the declaration is made during his term. *Riggs v. Cragg*, 26 Hun (N. Y.) 89. See also *Hite v. Hite*, 93 Ky. 257. (3) The Pennsylvania rule considers earnings made during the tenant's term, and only those, as "income," the form and time of the declaration of the dividend being of no consequence. *Earp's Appeal*, 28 Pa. St. 368; *Van Norden v. Alden*, 19 N. J. Eq. 176. Before attempting to select from these various views it should be noted that since the problem arises out of the words used in a trust instrument, it is primarily one of construction. No hard and fast rule can be laid down that under all circumstances "corpus" or "income" shall have the same meaning. In



every case it is the intention of the creator of the trust which must be sought.

Where, however, the instrument in the light of all the facts is ambiguous on this point, some rule must be adopted. The Massachusetts rule, in allowing the form of corporate action to determine the respective portions of the life-tenant and the remainderman, seems arbitrary. It is a rule easy of application, however; and this is a strong recommendation, since trustees should have a ready guide for their conduct. An objection is found, on the other hand, in the injustice which would result to the life-tenant in case the corporation pursued a policy of declaring stock dividends only. The New York and Kentucky rule avoids the last objection, but in doing so becomes more complicated and difficult of application, since it involves an investigation as to the sources of stock dividends. In their modification of the Massachusetts view, moreover, these courts seem to recognize that the earnings of the corporation are the "income" to which the life-tenant is entitled; but they do not go to the logical conclusion to which this theory would lead, and give the life-tenant only those earnings accruing during his term. This step is taken by the Pennsylvania court, and by so doing it seems to go to the substance of the matter, reaching thereby a position which it can maintain consistently. A just criticism of this rule, however, is that it is often very difficult to apply, since the investigations it involves would often be arduous and fruitless.

The court in the principal case did not base its decision on any of the foregoing rules, but found from the facts evidence of the testator's intention to treat the earnings of the corporation as the "income." Since it was agreed that the increase in price received for the shares was directly traceable to such earnings, this amount was given to the life tenant. In a *dictum* the court favored the Pennsylvania rule which would have brought about the same result. The general confusion in which this question is involved would to a great extent have been avoided had the judges always differentiated cases of ambiguity from those in which the intention of the testator is discoverable. Where, however, the latter guide does not exist, the rule laid down by the Pennsylvania court would seem preferable.

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RESTRICTIONS ON THE FREEDOM OF THE PRESS. — The Constitution of the State of New York provides that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press" (art. 1, § 8). John Most, the anarchist, was convicted under section 675 of the Penal Code, providing that "a person who willfully and wrongfully commits any act which seriously . . . endangers the public peace . . . is guilty of a misdemeanor." The act complained of was the publication of an article advocating wholesale murder of all officers of the government, and suggesting poison and dynamite as the proper means. The defendant's appeal from conviction on the ground that the section of the Code in its application to his case was unconstitutional, was dismissed. *People v. Most*, 171 N. Y. 423. Taken literally, the words of the Constitution could bear the interpretation desired by the defendant, the logical but absurd result of which would be that the legislature could not forbid the use of any sort of written language, no matter how pernicious. The correctness of the decision cannot be questioned.

Similar constitutional provisions have been held not infringed by enactments forbidding the publication of accounts or advertisements of lotteries, *Hart v. People*, 26 Hun (N. Y.) 396; public speaking on Boston Common without a license, *Commonwealth v. Davis*, 162 Mass. 510; the use of profane language, *State v. Warren*, 113 N. C. 683; the publishing of an immoral newspaper, *In re Banks*, 56 Kans. 242. The authorities, however, are not entirely unanimous, for, on the other hand, an ordinance declaring a newspaper to be a public nuisance and making it a misdemeanor to sell a copy was held unconstitutional. *Ex parte Neill*, 32 Tex. Crim. Rep. 275. And an order to certain State officers not to participate in politics, or to make political speeches was held void. *Louthan v. Commonwealth*, 79 Va. 196. It seems a fair inference from the cases that the guaranty of freedom of speech and of the press is little more than a declaration of English common law principles. Indeed at the present time it is difficult to discover wherein our press, as compared with that of England, has greater liberty by reason of its constitutional protection.

But such was not the case when the "free speech" provisions were being adopted. Though nominally the English press was as free as it is to-day, actually it was far more restricted. For in spite of the abolition of the Star Chamber in 1641, the lapsing of the power to license the press in 1695, and the uniform declaration of English judges that every man was free to publish anything he chose without previous license, being liable merely for the abuse of this freedom, there were reported in Howell's State Trials alone fifty-three cases of libel and "seditious words" during the eighteenth century. Of these twenty-nine were heard between 1783 and 1794. This trend of affairs in England Americans must have seen with concern, and it seems a fair conclusion, therefore, that our forebears meant by the constitutional guaranties to preserve freedom of public discussion, and not merely freedom from censorship. See COULEY, CONST. LAW, 301. Both Hamilton and Madison appear to have recognized this. The former defended the omission of a Bill of Rights from the Federal Constitution on the ground that the interpretation of such provisions must necessarily be so vague as to render them useless. See THE FEDERALIST, 631, 632. The latter, though he introduced the first ten amendments to the Constitution, did so not because he considered them necessary, but on the ground that many States had ratified that instrument only on the understanding that it should be thus amended. In fact, only the year previous he had written, "This essential branch of liberty [free press] is, perhaps, in more danger of being interrupted by local tumults, or the silent awe of a predominant party, than by any direct attacks of power." 1 WRITINGS OF JAMES MADISON, 195. Read in the light of the intention of the constitutional legislators, the subsequent decisions show that these provisions — found in so many of our constitutions — mean only that a man may freely speak and write what he chooses, so long as he does not thereby disturb private rights, the public peace, or attempt to subvert the government. See STORY, COM. ON CONST. § 1880.

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VOLUNTARY PETITION IN BANKRUPTCY BY COMMITTEE OF A LUNATIC. — A decision recently handed down by a United States District Court holds that the Bankruptcy Act of 1898 gives no jurisdiction to entertain the petition of a lunatic, filed by his committee. *In the Matter of Eisenberg*,

27 N. Y. L. J. 1909.<sup>1</sup> The actual decision does not seem open to question, since the filing of the petition was not authorized by the court in lunacy, but the opinion appears to adopt the broad ground that a lunatic can never benefit by the present Bankruptcy Act on a petition filed by his committee. The chief reasons advanced were that a lunatic could not perform the acts required of a bankrupt under sec. 7 of the Act, and that his committee could not divest him of title to his property in order to pass it to a trustee in bankruptcy. This latter objection would seem to be obviated, provided the property were within the jurisdiction of the court, by the statute which permits the Supreme Court to direct the committee to convey a lunatic's real property for the payment of his debts, the improvement of his estate, or "on account of other peculiar circumstances." N. Y. LAWS 1896, c. 545, § 156. And, independent of statute, the power of a court in lunacy to direct conveyances of personal property seems equally broad. *Ellis v. Prop'rs of Essex, etc., Bridge*, 2 Pick. (Mass.) 243. See *In re Freer*, 22 Ch. D. 622. It would follow, therefore, that a lunatic's property may, in the discretion of the court having jurisdiction, be conveyed to a trustee in bankruptcy. Such appears to have been the view in a case under the Act of 1867, where a lunatic who, before insanity, had committed an act of bankruptcy, was adjudged a bankrupt on petition by creditors. *In re Pratt*, 2 Lowell (U. S. Dist. Ct.) 96.

The objection that a lunatic cannot perform the acts required of a bankrupt under sec. 7 of the Act, though more serious, is not fatal. The requirements are that the bankrupt furnish and swear to a schedule of his property, attend the first meeting of creditors, and undergo examination. In view of like provisions in the Act of 1867, a doubt was expressed in the case last cited whether, even after an adjudication in bankruptcy, a lunatic could be granted a discharge. It has, however, been held in similar cases that where a statute provides for an affidavit by the lunatic, such affidavit may be made by his next friend. *Ex parte Roberts*, 1 Mont. & Chitt. 653; *Ex parte May*, 2 Mont. Deac. & DeG. 381. The other acts required seem clearly to fall within the power of the court as guardian of the lunatic's property. N. Y. LAWS 1896, c. 545, § 127. They would, therefore, form no obstacle to an adjudication and discharge.

No actual decision of the question has been found. The cases most nearly in point have arisen in England. The statutory provisions there are very similar to those of the United States and of New York under which the principal case was decided, both as to the personal acts required of the bankrupt and as to the power of the court in lunacy to direct conveyances. 46 & 47 VICT. c. 52, secs. 16, 17, 24; 53 & 54 VICT. c. 5, secs. 117, 120. Nevertheless the prevailing opinion in England seems to be that a lunatic is entitled to the benefit of the bankruptcy law, although there is no decision squarely to that effect. See *Anon.*, 13 Ves. 590; *Ex parte Cahen*, 10 Ch. D. 183. The court in lunacy has gone so far as to authorize a lunatic's committee to consent to an adjudication in bankruptcy against him, and has also ordered such a committee to file a petition in bankruptcy on behalf of a lunatic. *In re Lee*, 23 Ch. D. 216; *In re James*, 12 Q. B. D. 332. Section 8 of the Act of 1898 provides that insanity supervening during bankruptcy proceedings shall not abate them. This express provision, it was inferred by the court in the principal case, impliedly excludes other cases

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<sup>1</sup> When the case appears in the regular reports it will be noted among Recent Cases in a subsequent issue.

of insanity from the operation of the Act. But in view of the sweeping provisions of sec. 4, which allows "any person who owes debts except a corporation" to become a voluntary bankrupt, such construction seems a narrow one. It may be observed, too, that Congress, in enacting sec. 8, evidently contemplated in certain cases the performance by the lunatic's committee of the acts required of a bankrupt by sec. 7. The discussion of this question by the court, however, indicates what appears to be the real nature of the whole question. It is not primarily one of the power of the court in lunacy and of the committee, but of the objects and policy of the Bankruptcy Act. It would seem to be a sound policy to hold that lunacy does not prevent a man from receiving the benefits of a discharge in bankruptcy.

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FOREIGN LAW IN DOMESTIC CONTRACTS.—Though contracts are made every day between citizens or subjects of different states, and questions under them are continually arising, the law that is to govern the determination of their validity is not yet well settled; in fact, the decisions are hopelessly at variance. In recent years there have been frequent intimations in the cases that the law which should govern is the law that the parties intend. In the latest case involving the question, the Judicial Committee of the Privy Council has squarely affirmed this view. The plaintiff, who lived in the Island of Jersey, made there a contract of insurance with the resident agent of the Sun Fire Office. The contract contained a stipulation for arbitration in accordance with the English Arbitration Act. Agreements for arbitration are invalid by the law of Jersey. It was held that the English law was the law intended by the parties; and that it therefore governed the validity of the contract. *Spurrier v. La Cloche*, [1902] A. C. 446. The decision reflects the present tendency in the English Courts, and in the Supreme Court of the United States. *In re Missouri S. S. Co.*, 42 Ch. D. 321; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397. The view, moreover, is current among Continental writers. See GUTHRIE'S SAVIGNY, PRI. INTERNAT. LAW, § 372, note A. Authority, however, up to the present time is not weighty; and it is submitted that the view held is erroneous in theory.

It is a fundamental principle that any act has effect and gives rise to an obligation, only because some law declares that it shall do so; and it is obvious that the only law that can effectively so declare is the law of the place where the act is done. When the parties in the principal case signed their names to a printed document, if any right arose, it was because the law of Jersey said that signing names to such a printed document gave rise to a contract of insurance. By the law of Jersey, however, the stipulation regarding arbitration was void, and therefore did not give rise to any right. Though such a stipulation was valid by the law of England, this particular one could not gain any force from that fact, for the law of England could not act upon it in Jersey. Those who favor the rule that the intention of the parties should govern, argue, however, that when parties contract with reference to the law of England, it is the same as if the law of England were written in as a condition of the contract. This argument is specious, but unsound. It is true that if the law of Jersey did not forbid an agreement for arbitration, and if it was the law of England that in a contract such as that in the principal case arbitration could be had, an express or

clearly implied declaration that the contract was made with reference to the law of England would have the same effect as the insertion of an agreement to arbitrate. Conversely it follows that if an agreement of that kind inserted *in ipsius verbis* would be ineffective because forbidden by the law, an insertion of the same matter under the name of the law of England could have no greater effect. The difficulty of the courts seems to have arisen from a failure to note that though, as an aid to interpretation, it may be valuable to know what law the parties intended to have govern the contract, the matter of interpretation must be kept distinct from the effect of the contract after it has been interpreted.

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CONSTITUTIONALITY OF CLASSIFICATION OF CITIES. — Two recent decisions in Ohio have prominently brought up again the question which attracted so much attention last year in the Pennsylvania "Ripper Cases," namely, whether by classifying cities a special law can be passed in the guise of a general law. The Ohio Constitution provides that "the General Assembly shall pass no special act giving corporate powers." Since the adoption of the constitution it seems that the legislature of Ohio has classified cities according to population into eleven classes. REV. ST. OH. § 1546 ff. In these classes it has isolated each of the eleven principal cities of the state. The Supreme Court, departing from its previous acquiescence in such legislation, decided that in view of the trivial differences in population between the cities it could not regard the present classification as based on any real or supposed differences in local requirements, and that therefore the laws under it are special and unconstitutional. *State v. Jones*, 64 N. E. Rep. 424; *State v. Beacom*, 64 N. E. Rep. 427.

It must be admitted that classification of some sort is necessary. This was early recognized by the courts. *State v. Brewster*, 39 Oh. St. 653; *Wheeler v. Philadelphia*, 77 Pa. St. 338. The great differences of human situation and necessity demand it. A city needs to be treated differently from a village. Moreover a city of twenty thousand persons needs, conceivably, different treatment from one of five hundred thousand. But the question is, how far is this differentiation to be allowed? Can a city of one hundred thousand be honestly viewed as in a different class from one of one hundred and one thousand? The solution would seem to depend upon whether all cities having such a difference of population would *ipso facto* be in a different situation; for logically, classification should be based upon a characteristic of the cities that will of its own nature indicate a substantial difference of need as regards the law to be enacted. This principle has been recognized. *State v. Hammer*, 42 N. J. Law 435, 440. But even granting the propriety of the rule, a very difficult question arises in its application, — whether the legislature or the courts shall determine what difference is sufficient. On this point, though most courts assume their power to review in some degree the decision of the legislature, the authorities are in conflict. *Commonwealth v. Moir*, 199 Pa. St. 534; *contra*, *Van Ripper v. Parsons* 40 N. J. Law 1.

Undoubtedly the decisions in favor of the legislature are correct in holding that the motives of the legislature should in no event be looked into or questioned by the judiciary. But if these constitutional provisions are to be enforced at all, it seems clear that the courts must be allowed to look into the intent of the legislature. They must be allowed to establish whether the



law in question could reasonably have been passed for the class because it was in fact a separate class and could have been thought to need a separate treatment. It is true all presumptions must be made in favor of the legislature ; and the mere fact that there is but one city included should not necessarily condemn the law. *Darrow v. People*, 8 Colo. 418. But if by its terms in no event could any other city even in the future come within the operation of the act, then clearly the intent for its special effect is revealed, and the law is unconstitutional. *State v. Mitchell*, 31 Oh. St. 592 ; *Devine v. Cook County*, 84 Ill. 591. It is the province of the court to determine the intent of the legislature as revealed in the statute and the facts within the ordinary notice of a court. It was thus that the Ohio court reached its decision. The decision is notable as a check to a practice which threatens to nullify such constitutional provisions in almost every state. See in accord, *State v. Hammer*, 42 N. J. Law 435 ; *Bray v. Hudson*, 50 N. J. Law 82.

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SUIT ON GOVERNMENT CONTRACTS IN FOREIGN COURTS.—A decision of interest to Americans because of its connection with the late Spanish War, has recently been handed down in the House of Lords. A Scotch ship-building firm had contracted in 1896 to build four torpedo boat destroyers for the Spanish navy, and suit was brought because of the failure to finish them in contract time, whereby Spain was deprived of the use of them in the war. The contract was made by four naval officials, A, B, C, D, "in the name and representation of His Excellency, the Spanish Minister of Marine, in Madrid, hereinafter called the Spanish Government," on the one part, and the Clydebank Engineering, etc., Co., Ltd., on the other. The action was brought by E, F, G, H. four other officials, in the name of a different minister of marine. The decision was that they were entitled to sue. *Castaneda v. Clydebank Engineering, etc., Co., Ltd.*, 18 T. L. R. 773. The *ratio decidendi* seems to have been, that this contract was clearly made for the Spanish State ; and on behalf of Spain was signed by the proper officials ; and that it must have been within the contemplation of the parties that the incumbents of the offices designated would change. Therefore it was simple justice to allow the present incumbents to sue on the contract.

That one state may sue in the courts of another is too well settled to admit of question. *King of Spain v. Hullet*, 1 Cl. & Fin. 333 ; see 15 HARV. L. REV. 59. There is, however, the question in whose name a suit by a state must be brought. The generally accepted opinion has been that if the state be a monarchy, it should be brought in the name of the sovereign ; if a republic, in its own name. *United States v. Wagner*, L. R. 2 Ch. App. 582. Bearing this in mind, it seems hard to account for the decision in the present case. It is an elementary principle of the law of contract that suit on a contract can be brought only by parties thereto. The contract was made, on the one hand, for the Minister of Marine ; no mention was made of his successors. Admitting, for the moment, that the then Minister of Marine was the true party to the contract, he and he only could sue ; and the present plaintiff must be nonsuited, for his proof does not correspond with his pleadings. It is clear, however, that the Minister of Marine did not intend to be bound ; and it is equally clear that the defendant company had no wish to accept his personal responsibility. The contract was made through the Minister of Marine for a known principal, the Kingdom of Spain. This

was an entirely proper way to make a contract from the standpoint of the law of agency; and, furthermore, government contracts are usually made through the chief official of the appropriate department. It was, then, a matter for the administrative law of Spain to determine what agent should bring suit in the name of the King of Spain. Unquestionably it might settle, on whomsoever it would, — the Minister of Marine as well as any other; but it owed it to the defendant company to have the name of the true principal appear on the writ. Properly the Minister of Marine sues not as successor of the official by whom the contract was made, but as the present agent of the King of Spain. The House may have been, and probably was, influenced by a desire to aid the Spanish government; but the result will be confusion in international law on this point.

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**LIABILITY OF A PRINCIPAL FOR THE MISREPRESENTATIONS OF HIS AGENT.** — That a principal is liable in an action of tort for the expressly authorized misrepresentations of his agent is not disputed. Further, he is liable for misrepresentations not expressly authorized if made by his agent in the course of his employment. *Barwick v. English, etc., Bank*, L. R. 2 Ex. 259. The real difficulty in cases of the latter sort is to determine whether the agent was in fact acting in the course of his employment when he made the representation. In the leading case of *Grant v. Norway*, 10 C. B. 665, it was decided that the indorsee of a bill of lading issued by the master of a vessel when no goods had been received by him, could not recover from the proprietor of the vessel, because the master was not acting in the course of his employment in issuing the bill of lading before he had received the goods which it purported to represent. The actual decision is supportable on the ground that the indorser could not have recovered because he was party to the agent's fraud, and the indorsee stands in no better position. *Dows v. Perrin*, 16 N. Y. 325. But it is submitted that the decision cannot properly be rested upon the ground that the servant was not acting in the course of his employment. It is among the duties of the master of a vessel to issue bills of lading. If the master had issued the bill of lading mistakenly supposing that he had received the goods, it could scarcely be contended that he was not acting in the course of his employment. The nature of the act rather than the mental state of the agent should, according to the best opinion, be regarded in determining whether the act is in the course of employment. *Howe v. Newmarch*, 12 Allen (Mass.) 49. Adopting this view, a principal should be held liable whether the agent's representation is or is not intentionally false. *Armour v. Mich. Cent. Ry. Co.*, 65 N. Y. 111.

Nevertheless the House of Lords has recently approved the doctrine of *Grant v. Norway*, in *George Whitechurch, Ltd., v. Cavanagh*, [1902] A. C. 117. In that case the secretary of the company, to accommodate a friend, certified a transfer of shares directed to Cavanagh, though the certificates for the shares were not lodged in the company's office, as the certification represented. The case cannot be supported, as *Grant v. Norway* can, on the ground that Cavanagh was affected by the fraud of one acting in collusion with the agent, for the misrepresentation was made directly to him. See 1 PALMER, COMPANY PREC., 6th ed., 323. The judges seem to find difficulty in holding liable a principal so free from all blame. But it is to be remembered that if principals escaped whenever free from blame, there would be no special law of agency.

Some of the Law Lords take occasion to approve, also, the doctrine of *British Mut. Banking Co. v. Charnwood, etc., Co.*, 18 Q. B. D. 714, in which it is decided that a principal is not liable for the misrepresentations of his agent unless such misrepresentations were made for the benefit of the principal. This doctrine has been generally accepted as the English law, and disapproval of it was hardly to be expected. Yet it is believed that it is unsound, for, as already suggested, the nature of the act should alone be regarded in determining whether it was done in the course of employment. A servant about his master's business acts for his own benefit and not for the benefit of his master when he engages in a conversation with a friend, or indulges in a nap; yet if injury results to a third party from his inattention to duty, the master would be liable to respond in damages. There seems to be no reason for applying a different rule when the tort which the servant commits is wilful rather than negligent. The American courts, in determining a principal's liability, do not inquire whether the agent was acting for his principal's benefit either in cases of intentional or unintentional tort.

## RECENT CASES.

**AGENCY — WILFUL MISREPRESENTATIONS BY AGENT — PRINCIPAL'S LIABILITY TO THIRD PERSONS.** — The secretary of a company, to accommodate a friend, certified a transfer of shares, though the certificates were not lodged in the company's office as represented. *Held*, that the company is not liable to the transferee for the misrepresentation of its secretary. *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117. See NOTES, p. 61.

**BANKRUPTCY — DEBTS NOT DISCHARGEABLE — JUDGMENT FOR LIBEL.** — *Held*, that libel is a "wilful and malicious injury to the person" within the meaning of c. 3, § 17 of the Bankruptcy Act of 1898, and therefore that proceedings under the Act do not discharge a judgment obtained in an action for libel. *McDonald v. Brown*, 51 Atl. Rep. 213 (R. I.).

Proof of actual malice is not necessary to maintain an action for libel. *Ullrich v. N. Y. Press Co.* (Sup. Ct., Tr. T.), 23 Misc. (N. Y.) 168; ODGERS, LIBEL AND SLANDER, 2d ed. 269. It is, however, generally held that so-called malice in law, or absence of legal excuse, is an essential element. *Bromage v. Prosser*, 4 B. & C. 247; *Barr v. Moore*, 87 Pa. St. 385. The court in the principal case applied to the word "malicious" in the Act this fictitious meaning. But, since the section in question in effect imposes a penalty, it would seem more reasonable to hold that Congress intended to use the word in its natural sense, requiring a bad *animus* to be shown. This seems to be the first case of a judgment for libel arising under this section. The only other cases to be found in which this clause was interpreted are those of judgments for seduction and criminal conversation. The court's construction of "malicious" finds support in these cases. *In re Maples*, 105 Fed. Rep. 919; *Colwell v. Tinker*, 169 N. Y. 531. As there may be a negligent publication, the decision, in holding that a libel is necessarily wilful, seems further open to criticism. See *Vitz Etelly v. Mundie's Select Library, Ltd.*, [1900] 2 Q. B. 170. Libel was properly regarded as an "injury to the person" within the meaning of the Act. See *In re Freche*, 109 Fed. Rep. 620; *Colwell v. Tinker*, *supra*.

**BANKRUPTCY — PETITION BY COMMITTEE OF A LUNATIC.** — A petition in bankruptcy was filed by the committee of a lunatic. *Held*, that the court had no jurisdiction to entertain such a petition. *In the matter of Eisenberg*, 27 N. Y. L. J 1909 (Sept. 29, 1902). See Notes, p. 56.

**CONFLICT OF LAWS — INTERPRETATION OF WILL OF PERSONALTY — LAW OF TESTATOR'S DOMICILE.** — A testator domiciled in England bequeathed money to the next of kin of A, domiciled in Germany. The next of kin according to the German law was A's niece, according to the English law his step-sister. *Held*, that the will must be interpreted according to English law. *In re Fergusson's Will*, [1902] 1 Ch. 483 (Eng.).



A will of personalty is in general to be interpreted according to the law of the testator's domicile at the time of his death. See DICEY, CONF. OF LAWS, 695. Consequently technical legal terms such as "next of kin" are given the meaning attached to them in the law of that jurisdiction. *Knights Templars, etc., Ass'n v. Greene*, 79 Fed. Rep. 460; *cf. Staigg v. Atkinson*, 144 Mass. 564. The application of this rule to the principal case leads to the curious result that the members of a German family domiciled in Germany are determined according to English law. The rule is generally said to be based on the presumption that the testator was familiar with the technical meaning of the language in his domicile, and intended that meaning to be applied to it. This is obviously fictitious. The rule, however, is well established, and, perhaps, works no hardship in the general case. It has the merit of simplifying interpretation; but when, as in the principal case, the language may well have either one of two meanings, the rule becomes arbitrary, and may often defeat the testator's intention.

**CONFLICT OF LAWS — JURISDICTION — RIGHT ACQUIRED UNDER FOREIGN STATUTE.** — Under the Mexican statute giving an action for death by wrongful act, the liability of the defendant is limited to furnishing support to the legal dependents of the deceased during the periods of time that support would have been due from him, payments being made in monthly instalments. Action was brought under this statute by the proper parties, in the United States Circuit Court. *Held*, that the court should decline jurisdiction. *Mexican, etc., R. R. Co. v. Slater*, 115 Fed. Rep. 593 (C. C. A., Eighth Circ.).

On principle it should be immaterial whether foreign-acquired rights arise under statutes or at common law. See *Dennick v. Central R. R., etc.*, 103 U. S. 11. In practice, however, a distinction is sometimes made. All courts seem to agree in refusing to enforce penal obligations, or claims whose enforcement would violate public policy. *O'Reilly v. N. Y., etc., R. R.*, 16 R. I. 388; *The Kensington*, 183 U. S. 263. It ought equally to be recognized as immaterial whether there would have been any cause of action under the local law, since it is the foreign law that determines the right in question. Such is the general rule as to common law rights. *Greenwood v. Curtis*, 6 Mass. 358. Where, however, the right accrued under a foreign statute, some courts make the existence of a similar local statute essential to give jurisdiction. *St. Louis, etc., Ry. v. McCormick*, 71 Tex. 660; *Anderson v. Milwaukee, etc., Ry. Co.*, 37 Wis. 321; *The Hulley*, L. R. 2 P. C. 193. But the existence of such a statute seems more properly held unnecessary. *Herrick v. Minneapolis, etc., Ry. Co.*, 31 Minn. 11. Moreover dissimilarity should be immaterial unless so great as to conflict with public policy. See *Evey v. Mexican, etc., Ry. Co.*, 81 Fed. Rep. 294. A foreign statute may, however, give a right of so peculiar a character that the court cannot, under its procedure, do substantial justice between the parties. It may then properly decline jurisdiction. See *Higgins v. Central, etc., Ry. Co.*, 155 Mass. 176. On this ground the principal case may be rested.

**CONFLICT OF LAWS — TAXATION OF NON-RESIDENT'S CHOSSES IN ACTION.** — A New Jersey corporation had a permanent place of business in Georgia, where it sold goods regularly for cash and on short credit, through an agent. The money collected was remitted from time to time to a New York office. *Held*, that the cash on hand and solvent accounts are taxable by the city in which the branch is located as the property of a non-resident. *Armour Packing Co. v. Mayor, etc., of Savannah*, 41 S. E. Rep. 237 (Ga.).

Personal property of a non-resident is liable to taxation where located, even though taxed also at the owner's domicile. *Coe v. Errol*, 116 U. S. 517. Obviously, therefore, the money collected was properly taxed; and the credits are within the same rule if it can be said that they exist within the city. There are various views as to the situs of a chose in action. For example, the courts declare that it is at the owner's domicile, that it follows the debtor, and that a chose in action has no situs. *Louisville & N. Ry. Co. v. Nash*, 118 Ala. 477; *Chicago, etc., Ry. Co. v. Sturm*, 174 U. S. 710; *Peckham, J.*, in *Gutlander v. Howell*, 35 N. Y. 657, 661. It is hardly too much to say that the policy and convenience in each class of cases determine whether a chose in action shall be considered for the purposes involved, as existing in a particular place. For purposes of taxation a credit is very generally regarded as property at the place where it is held, and claims of a non-resident creditor, in an agent's hands, are taxable at the agent's domicile. *People v. Trustees of Ogdensburg*, 48 N. Y. 390, 397; *Catlin v. Hull*, 21 Vt. 152; *People v. Barker*, 23 N. Y. App. Div. 524; *contra*, *City of Vicksburg v. Armour Packing Co.*, 24 S. W. Rep. 224 (Miss.). Consequently the credits also were properly taxed.

**CONFLICT OF LAWS — VALIDITY OF CONTRACTS — LAW OF THE INTENTION OF PARTIES.** — The plaintiff, living in the Island of Jersey, insured a stamp collection

with the Sun Fire Office through its agent in Jersey, the policy containing an arbitration clause referring to the English Arbitration Act. A loss having occurred and arbitration failing, the plaintiff brought suit against the agent in Jersey. *Held*, that giving effect to the intention of the parties, the contract was to be governed by the law of England. *Spurrier v. La Cloche*, [1902] A. C. 446 (Eng., P. C.). See NOTES, p. 58.

CONSTITUTIONAL LAW — RESTRICTIONS ON FREEDOM OF THE PRESS. — The defendant published an article advocating wholesale murder of all officers of the government. He was convicted under section 675 of the New York Code, providing that "a person who wilfully and wrongfully commits any act which seriously . . . endangers the public peace . . . is guilty of a misdemeanor." *Held*, that conviction under this provision does not infringe the constitutional right of freedom of the press. *People v. Most*, 171 N. Y. 423. See NOTES, p. 55.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — CLASSIFICATION OF CITIES. — A municipal board of control held office under a statute applying only to "cities of the second grade of the first class." Only one city was included in the class. *Held*, that since "the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification," the law is special and invalid. *State v. Beacom*, 64 N. E. Rep. 427 (Oh.). See NOTES, p. 59.

CONTRACTS — IMPOSSIBILITY AS AN EXCUSE — CHANGE OF FOREIGN LAW. — The defendant contracted at New York to furnish laborers for transportation from Barbadoes. A subsequent colonial ordinance forbade further embarkation of such laborers. *Held*, that this was no excuse for non-performance of the contract. *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. Rep. 985 (Dist. Ct., S. D., New York).

A change of domestic law is universally held to be an excuse for the non-performance of a contract. *Baily v. De Cr spigny*, L. R. 4 Q. B. D. 180; *Exposito v. Bowden*, 7 E. & B. 763; *Cordes v. Miller*, 39 Mich. 581. This rule is necessary to avoid the manifest injustice of forcing a defendant to pay damages for not doing an illegal act. The law ought not at the same time to enforce and forbid. The same necessity does not exist, however, when the performance has become contrary to foreign law; for a foreign law is a fact, beyond the control of the state, which may render the contract impossible but not illegal. Accordingly the English Courts have consistently held that impossibility resulting from the intervention of foreign law does not excuse. *Blight v. Page*, 3 Bos. & Pull. 295, note; *Barker v. Hodgson*, 3 M. & S. 267; *Jacobs v. Cr dit Lyonnais*, 12 Q. B. D. 589. This case is apparently the first in this country in which the point was involved, and, in following the English rule, it would seem to oppose the present commendable tendency of some American courts to extend the scope of impossibility, as an excuse. See *Lovering v. Buck Mountain Co.*, 54 Pa. St. 291; *Buffalo, etc., Co. v. Bellevue, etc., Co.*, 165 N. Y. 247. See 15 HARV. L. REV. 63, 418.

CONTRACTS — REPUDIATION AS A DEFENCE IN AN ACTION FOR PAYMENTS ALREADY DUE. — A contractor agreed with the city of B. to erect a building for a lump sum, payments to be made monthly for seventy per cent of the work done. With the consent of the city the contractor assigned his rights to the plaintiff, at whose request the city held back the monthly instalments. After three payments had become due the contractor repudiated the contract and his surety carried it out. In a suit by the surety against the city, the plaintiff intervened. *Held*, that the city has a right to declare the deferred payments forfeited and that the surety is subrogated to that right. *First Nat. Bank v. City Trust, etc., Co.*, 114 Fed. Rep. 529 (C. C. A., Ninth Circ.).

In an action of contract the defence of non-performance by the plaintiff is now conceived to be an equitable defence, analogous to failure of consideration. See 14 HARV. L. REV. 424, 543. The city's obligation seems to have been indivisible; but, for the convenience of the contractor, monthly payments in advance had been agreed upon. As each payment fell due, the plaintiff as assignee might be regarded as acquiring a vested right to it, of which no subsequent breach could deprive him. See *Jackson v. Cleveland*, 15 Wis. 107. The right of the city would then be a counter claim or a direct action against the contractor. Since, however, each part payment is not for work already done, but is rather an advance, the mere fact that the contractor's default occurs after several instalments have become due, should not deprive the city of its equitable defence. As the surety is subrogated to all the city's rights, the decision seems correct, assuming that the city had not received substantial performance.

CONTRACTS — REPUDIATION BY MAIL — WHERE ACTION ACCRUES. — The defendant had hired the plaintiff for a definite term as his London correspondent. Before the end of the term the defendant wrote the plaintiff from Naples terminating his employment. This letter the plaintiff received in London. In order to obtain service upon the defendant abroad it was necessary for the plaintiff to bring himself within

the statute by proving, *inter alia*, that the breach of the contract occurred in England. *Held*, that there was a complete breach of the contract where the letter was posted abroad. *Holland v. Bennett*, [1902] 1 K. B. 867 (Eng.).

This result is supported by English authority. *Cherry v. Thompson*, L. R. 7 Q. B. 573; *Matthews v. Alexander*, Ir. Rep. 7 C. L. 575; *Hamilton v. Barr*, 18 L. R. Ir. 297. The American decisions most closely analogous seem to point to the opposite conclusion. It is held that an employee is entitled to his wages until he has received notice of his discharge. *North Chgo., etc., Co. v. Hyland*, 94 Ind. 448. Only after receipt of the letter can an offer be acted upon. *Tinn v. Hoffman & Co.*, 29 L. T. Rep. N. S. 271, 277. The same is true of the retraction of an offer. *Henthorn v. Fraser*, [1892] 2 Ch. D. 27. It also holds in the case of the revocation of an agent's authority. *Robertson v. Cloud*, 47 Miss. 208; *Sayre v. Wilson*, 86 Ala. 151. True, it is generally law that the mailing of the acceptance completes the contract. *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Tayloe v. Merchants Fire Ins. Co.*, 18 Curtis (U. S. Sup. Ct.) 191. But this is an exception to the general rule that only the communicated intention is effectual; and it does not seem so closely analogous to the principal case as do the instances of revocation of an agent's authority, or of an offer. It would consequently seem to follow that the breach of contract was committed at the time and place of delivery of the letter, and that the plaintiff was entitled to the service desired.

**CORPORATIONS — COLLATERAL ATTACK OF STATUS IN EMINENT DOMAIN PROCEEDINGS.** — In eminent domain proceedings to condemn a right of way, the defendant alleged that the plaintiff was not a corporation *de jure*. *Held*, that the question whether the plaintiff is a corporation *de jure* or *de facto* cannot be raised in these proceedings. *Postul, etc., Co. v. Oregon, etc., R. R. Co.*, 114 Fed. Rep. 787 (Circ. Ct., Mont.).

Ordinarily only the sovereign in a direct suit can inquire whether a corporation has strictly complied with the statutory requirements of organization, and thus become a corporation *de jure*. See THOMPSON, CORP., § 1850. But when it is sought to enforce the right of eminent domain, the defence that the plaintiff is but a *de facto* corporation has sometimes been allowed a private person. *Orrick School District v. Dorton*, 125 Mo. 439; see *N. Y. Cable Co. v. Mayor, etc., of N. Y.* 1, 43. The justification for this exception to the usual rule is to be found in the nature of the extraordinary right of eminent domain. It would seem reasonable that a corporation, in order to take advantage of this delegated prerogative of the sovereign, should be required to be a *de jure* corporation, assured of permanency; and not merely *de facto* and liable at any time to dissolution by *quo warranto* proceedings. See 2 MORAWETZ, CORP., § 768. This view, however, seems not to have been widely considered by the courts; and it must be admitted that the holding in the principal case accords with the weight of authority. *National Docks Ry. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *Brown v. Calumet, etc., Ry. Co.*, 125 Ill. 600.

**CORPORATIONS — MORTGAGE OF FRANCHISES — EFFECT OF STATUTE UPON RIGHTS OF PURCHASER AT FORECLOSURE SALE.** — The statutes of New York, 1892, c. 688, §§ 2, 3, allow corporations to mortgage their property and franchises, and authorize purchasers at a foreclosure sale to form a corporation which shall enjoy all the rights, privileges, and franchises which at the time of the sale belonged to the mortgagors. The defendant was duly organized under these provisions. During the life of the old company and prior to the foreclosure, the legislature passed an act compelling railroads to issue mileage books upon specified terms. *Held*, that the defendant is bound by this statute. *Minor v. Erie R. R. Co.*, 171 N. Y. 566.

The statute in question could not be enforced against corporations existing before its passage, because of the Fourteenth Amendment. *Lake Shore, etc., Ry. v. Smith*, 173 U. S. 684. To bring itself within the scope of this decision the defendant must show that it continues the corporate existence of its predecessor. But the right to be a corporation is generally held not to be included in the term "franchises," and, therefore, not to be transferable by sale or mortgage. *State v. Sherman*, 22 Oh. St. 411; and see *Commonwealth v. Smith*, 10 Allen (Mass.) 448; but *cf. St. Paul, etc., R. R. Co. v. Parker*, 14 Minn. 297. The statute cannot, in the second place, be resisted on the ground that the constitutional immunity was, by fair implication, reserved to the new company by the statute under which it incorporated. Those terms reasonably implied only the rights, privileges, and franchises received at the hands of the state; and it appears to be a settled rule that courts shall construe statutes most favorably to the state. See *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 561. Finally, the act in question is not void as impairing a contract right of the defendant to receive the franchises which it purchased, undiminished in value, since upon authority no such contract was created. *Schurz v. Cook*, 148 U. S. 397. The decision in the principal case seems, therefore, unassailable.

**CORPORATIONS — OBLIGATION OF BANK DIRECTOR TO WARN DEPOSITOR OF INSOLVENCY.** — A bank director, after he had discovered the insolvency of the bank, permitted deposits to be received, without attempting to have the bank closed, or to warn depositors. There was some evidence that he had actually directed the cashier to receive deposits. *Held*, that he was liable to subsequent depositors for fraud, in that, by his failure to act, he had held out the bank as solvent. *Cassidy v. Uhlman*, 63 N. E. Rep. 554 (N. Y.).

One may be liable for fraud on the ground of mere nonfeasance, but only where he owed to the party defrauded some positive duty to act. *Loewer v. Harris*, 57 Fed. Rep. 368. It is difficult to see how a director, by an undertaking between himself and the stockholders to perform the duties of his office, thereby incurs liability to third parties for failure to perform such duties. Accordingly, it has been held that he owes to creditors no duty to use due care in the conduct of the business. *Jackson v. Munster Bank*, Ir. L. R. 15 Eq. 356. He is, of course, liable to stockholders for negligence on account of his fiduciary relation. *Union Nat. Bank v. Hill*, 148 Mo. 380. It would seem, then, that defendant's failure to act in this case was not a breach of any duty to the depositors, and consequently no fraud upon them. So far as the decision is based on evidence of a positive act of direction, however, it seems sound. *Humphling v. Burr*, 59 Mich. 294.

**CORPORATIONS — RECEIVER FOR RAILROAD — CERTIFICATES GIVEN PRIORITY TO MORTGAGES.** — A court of equity authorized its receiver to issue, for the completion of a railroad, certificates with priority of lien, without giving the bondholders an opportunity to be heard. *Held*, that the court has exceeded its power. *Bibber-White Co. v. White, etc., Co. et al.*, 115 Fed. Rep. 786 (C. C. A., Second Circ.). See NOTES, p. 53.

**DAMAGES — MENTAL DISTRESS AS AN ELEMENT OF DAMAGES — DELAY IN SHIPMENT OF CORPSE.** — The defendant, a common carrier, negligently delayed the shipment of a corpse which it had received from the plaintiff and knew to be that of his wife. The resulting anxiety and necessity of postponing the funeral caused the plaintiff great mental distress, but did him no physical injury. *Held*, that the plaintiff was entitled to recover for his mental distress as an element of damages. *Louisville & N. R. R. Co. v. Hull*, 68 S. W. Rep. 433 (Ky.).

This case seems a logical application to carriers of the doctrine of the telegraph cases. *Chapman v. Western Union Tel. Co.*, 90 Ky. 265. In actions for breach of contract of marriage, also, mental distress has very generally been allowed as an element of damage. *Tobin v. Shaw*, 45 Me. 331. In such cases the probability of great mental distress resulting from breach of the contract is no stronger than in the principal case, while all the practical objections apply as well to the former as to the latter. Unlike the ordinary marriage contract case, the wrong here was negligent only; yet damages are often allowed for mental suffering occasioned by negligence, as when concurrent with physical injury, or in actions for libel or slander negligently published. *Carpenter v. Mexican Nat. R. R. Co.*, 39 Fed. Rep. 315; *Morrison v. Ritchie & Co.*, 39 Scot. L. Rep. 432; 112 L. T. 472. But notice to defendant that his negligence would probably cause mental distress is essential to the plaintiff's right of action. *Nichols v. Eddy*, 24 S. W. Rep. 316 (Tex.). The case accords with what little authority has been found. *Hale v. Bonner*, 82 Tex. 33; *Wells, Fargo & Co.'s Express v. Fuller*, 35 S. W. Rep. 824 (Tex.). It would follow from a contrary holding that only nominal damages could be recovered for the loss of a corpse, since there is no property in a dead body. 2 BL. COM. 429; *Williams v. Williams*, 20 Ch. D. 659.

**EQUITY — INJUNCTION AGAINST BREACH OF CONTRACT — MUTUALITY.** — The defendant contracted to render personal service as a ball player exclusively to the plaintiff, who was to have the right to renew the contract during the three following seasons and to terminate the whole engagement upon ten days' notice. The plaintiff brought a bill to restrain the defendant from rendering service to others in breach of his contract. *Held*, that the contract is not lacking in mutuality and that the threatened breach will be enjoined. *Phila. Ball Club v. Lajoie*, 51 Atl. Rep. 973 (Pa.); *contra, Brooklyn, etc., Club v. McGuire*, 116 Fed. Rep. 782. See BOOKS AND PERIODICALS, p. 72.

**EQUITY — PURCHASE FOR VALUE WITHOUT NOTICE — ASSIGNMENT OF JUDGMENT THROUGH FRAUD.** — The plaintiff was induced by fraud to assign a judgment to B, who thereupon sold it to the defendant, as purchaser for value without notice. A bill was filed to have the assignment set aside. *Held*, that the defendant took subject to all the equities existing against his assignor. *Luecht v. Pearson*, 101 Ill. App. 236.

It is usually thought that the authorities are in hopeless conflict on this question. In England there is some confusion. See *Ashwin v. Burton*, 32 L. J. Ch. 196; *cf. Cockell v. Taylor*, 15 Beav. 103. But in America the weight of authority seems strongly



with the purchaser. *Williams v. Donnelly*, 74 N. W. Rep. 601, 605 (Neb.). *Starr v. Huskins*, 26 N. J. Eq. 414. Even in jurisdictions which repudiate the general principle that an innocent purchaser of a non-negotiable chose in action takes free from latent equities, the same result is reached on the ground that the assignor is estopped. *Moore v. Moore*, 112 Ind. 149; *Moore v. Metropolitan Bank*, 55 N. Y. 41. The contrary decisions seem to confuse equitable defences of an obligor with equities of persons other than an obligor. See *Cutts v. Guild*, 57 N. Y. 229. Against the obligor, to be sure, an assignee stands in the shoes of his assignor. But since he gets a legal right by his assignment, against equities of third parties he should be protected. 1 HARV. L. REV. 7. The principal case therefore seems unsound. It was decided on New York authority: *Bush v. Lathrop*, 22 N. Y. 535; *Cutts v. Guild*, 57 N. Y. 227. But the court seems not to have noted the previous decisions the other way in its own jurisdiction; nor that the New York cases relied on have been much modified if not overruled. *Silverman v. Bullock*, 98 Ill. 11; *Himrod v. Gilman*, 147 Ill. 293; *Humble v. Curtis*, 160 Ill. 193; *Merchants Bank v. Weill*, 163 N. Y. 436. The decision is more over to be regretted from the standpoint of business convenience.

**EQUITY — RIGHT TO PRIVACY. — INJUNCTION** — A flour company published lithograph portraits of a young woman as a trade advertisement without her consent. The plaintiff asked for an injunction and for damages. *Held*, that she has no cause of action. *Roberson v. Rochester, etc., Co.*, 171 N. Y. 538. See BOOKS AND PERIODICALS, p. 72.

**EQUITY — TRADE LIBEL — RESTRAINING PUBLICATION BY INJUNCTION.** — The defendant, editor of a magazine, published fictitious letters containing false statements derogatory to the plaintiff's goods. *Held*, that a bill for an injunction stating the above facts is demurrable. *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384. For a discussion of this case after the contrary decision of the Supreme Court, see 15 HARV. L. REV. 734.

**INSURANCE. — BENEFIT SOCIETIES — EFFECT OF CONTRACT TO NAME AS BENEFICIARY.** — A member of a benefit society took out a certificate naming his sister as beneficiary. Later, by an ante-nuptial contract, he agreed to substitute his intended wife as beneficiary; but he died before fulfilling the agreement. The association filed a bill of interpleader against the sister and the widow. *Held*, that the widow is entitled to the proceeds of the insurance. *Pennsylvania, etc., Co. v. Wolfe*, 52 Atl. Rep. 247 (Pa.).

In general, no change of beneficiary under such a policy is effectual unless the rules of the society are strictly complied with. *Holland v. Taylor*, 111 Ind. 121. In three well-defined classes of cases, however, where the insured has attempted to procure a change, but without fully complying with the rules, the courts sustain the change. *Manning v. Ancient Order, etc.*, 86 Ky. 136; *Grand Lodge, etc., v. Child*, 70 Mich. 163; *Hirsch v. Clark*, 81 Ia. 200. The present case goes further in giving effect to a change merely contracted for. The decision, however, though novel, seems sound. Contrary to the usual rule as to life insurance policies, a change of beneficiary in policies of benefit societies can be made without the consent of the person already named. *Masonic, etc., Society v. Burkhardt*, 110 Ind. 189. The sister, therefore, before the death of the insured, had no vested interest of which the agreement to substitute the wife as beneficiary could defraud her. See *Hoefst v. Supreme Lodge, etc.*, 113 Cal. 91. Being, moreover, a mere volunteer, she has no standing in equity as against one who has given value. Support is given to the decision by the cases found most nearly in point. *Leaf v. Leaf*, 92 Ky. 166; see also *Jory v. Supreme Council, etc.*, 105 Cal. 20. It is further supported by the closely analogous cases of unfulfilled agreements to give legacies. See *Riley v. Allen*, 54 N. J. Eq. 495.

**INSURANCE — VALUED POLICY ON SHIP — INSURER'S LIABILITY FOR GENERAL AVERAGE AND SALVAGE CHARGES.** — The vessel was valued at £33,000, and was insured for that amount. She incurred general average and salvage charges of £530, which were assessed on a valuation of £40,000. *Held*, that the insurers are liable for only thirty-three fortieths of the charges. *S. S. Balmoral Co. v. Martin*, 18 T. L. R. 802 (Eng. H. L.).

Authority on the question is meagre. The case is supported by an early Massachusetts decision, but the New York and Federal Courts hold the insurer liable for the entire charges. *Clark v. United Fire, etc., Co.*, 7 Mass. 365; *Providence, etc., Co. v. Phoenix Ins. Co.*, 89 N. Y. 559; *Internat. Navig. Co. v. Atlantic, etc., Co.*, 100 Fed. Rep. 304. Cases of particular average on cargo are to be distinguished. The reason for using in those cases a formula similar to that employed here, is that the value of the cargo is subject to great fluctuations, and the owner is not insuring his profits, but merely securing himself against actual loss. See *Lewis v. Rucker*, 2 Burr. (Eng.) 1167. The

value of the ship, on the other hand, is practically constant, so that the reason for applying this formula disappears in such a case. See 2 ARNOLD, MARINE INS., § 1023. The court rests the decision on the ground that an owner who undervalues his ship is to be treated as an insurer for the excess of the actual worth over the policy value. But the rule of the New York and Federal Courts seems better adapted to the purpose of insurance, which is to protect the owner against all loss, up to the amount of his policy.

INTERNATIONAL LAW — GOVERNMENT CONTRACT — MINISTER AS PLAINTIFF. — A shipbuilding firm contracted with A, B, C, D representing X, Minister of Marine of Spain. The ships contracted for were not delivered in time; and E, F, G, H, representing J, now Minister of Marine, sue. *Held*, that the suit is well brought. *Castuneda v. Clydebank Engineering, etc., Co., Ltd.*, 18 T. L. R. 773 (Eng., H. L.). See NOTES, p. 60.

MANDAMUS — DIRECTED AGAINST EXECUTIVE — MINISTERIAL ACTS. — The governor of the State refused to fill a vacancy in the office of lieutenant-governor, by appointment, as directed by statute. *Held*, that mandamus will lie to compel an appointment. *State ex rel. v. Nash, Governor*, 64 N. E. Rep. 558 (Ohio).

A small majority of State courts wholly refuse to issue a mandamus against the governor, for the reason that executive functions should be free from judicial control. *People ex rel. v. Governor*, 29 Mich. 320. Some duties of the governor, however, in which no discretion is involved and the method of performance is fully prescribed by law, are wholly ministerial, and accordingly many courts will issue a mandamus in such cases. *Martin, Governor, v. Ingham*, 38 Kan. 641. See *Marbury v. Madison*, 1 Cranch (U. S. Sup. Ct.), 137. While this doctrine seems sound, it obviously should be applied with caution. The court in the principal case sought to conform its action to this doctrine, by leaving the selection of an appointee to the unrestrained discretion of the governor, and decreeing merely that some appointment be made. Such a splitting up of a single duty, however, compelling the governor to use his discretion, and yet attempting to leave that discretion perfectly free, goes beyond the reason and authority of previous cases, and is too subtle to be safely followed.

MUNICIPAL CORPORATION — GRANT OF LIGHTING FRANCHISE — COMPETITION BY CITY. — A state statute authorized cities to erect electric lighting plants, with a proviso that the right might be delegated. The plaintiff company was chartered by a city to erect and maintain such a plant for twenty years. Before the expiration of this time the city council voted to erect a municipal plant, to be maintained in competition with plaintiff. *Held*, that this is an act under state authority, impairing the obligation of a contract. *Southwest Mo. Light Co. v. City of Joplin*, 113 Fed. Rep. 817 (Circ. Ct., W. D. Mo.).

The court argues that in a grant of a franchise to operate in a certain field, there is implied a promise not to impair the value of that field by competition. But it is a well-recognized rule that public grants are construed strictly against the grantee. *Appeal of Scranton Electric, etc., Co.*, 122 Pa. St. 154. An intention to grant an exclusive privilege will not be attributed to the governing body, except upon clear evidence. See *Jersey City, etc., Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427. In the case relied upon by the court as authority for its decision, there was an express provision in the contract, that the city should not build during the term of the grant. *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. Rep. 957. Where there is no such provision, the grant has usually been construed as not exclusive. *Hamilton, etc., Co. v. City of Hamilton*, 146 U. S. 258. It would seem, therefore, that this grant should include merely a right to supply such customers as the company can attract by superior service.

MUNICIPAL CORPORATION — NEGLIGENCE IN MAINTAINING DRAINS — INJURY TO HEALTH AND PROPERTY. — A drainage ditch constructed by a municipal corporation became through negligence so obstructed that it repeatedly overflowed the plaintiff's adjoining premises, and caused damage to his property and illness in his family. *Held*, that the plaintiff could recover for injury to his property, but not for damage on account of the illness of himself or family. *Williams v. Town of Greenville*, 130 N. C. 93.

It is well settled that a municipal corporation is not liable for damages caused by acts performed in its governmental capacity as distinguished from its corporate or ministerial capacity. *Fire Ins. Co. v. Village of Keeseville*, 148 N. Y. 46. The court considered the care of a drain an act done in governmental capacity, but nevertheless allowed recovery for injury to the property, regarding it as within the constitutional prohibition against taking property without compensation. The care of a drain,

however, is, by the better view, a ministerial duty, and the city's liability is based on the failure to perform it properly. *Bates v. Westborough*, 151 Mass. 174, 183; *Hession v. Mayor, etc., of Wilmington*, 1 Marvel (Del.) 122. The distinction made by the court in the principal case between injury to property and injury to health seems not well taken. True, it has been held that one cannot recover for an injury to health when the injured person suffers only as a member of the public. *Hughes v. City of Auburn*, 161 N. Y. 96. But when, as in the principal case, the plaintiff can show a trespass as a basis for his action, he can recover also consequential damages caused by injury to health. *Allen v. City of Boston*, 159 Mass. 324.

**PLEADING — DEMURRER TO BILL IN EQUITY — ADMISSION OF TRUTH OF FACTS WELL PLEADED** — The State of Kansas filed a bill in equity to restrain the State of Colorado from diverting the waters of the Arkansas River to the detriment of the inhabitants and public institutions of the complainant State. *Held*, that a demurrer to the bill will not be regarded as admitting the truth of the facts well pleaded, but shall be overruled with leave to the defendant to answer. *Kansas v. Colorado*, 22 Sup. Ct. Rep. 552.

The rule has heretofore been well settled that a demurrer to a bill in equity admits the truth of all material facts, properly pleaded. *Interstate Land Co. v. Maxwell, etc., Co.*, 139 U. S. 569; *Gage v. Bailey*, 115 Ill. 646. This rule was not followed in the principal case for the reason, as the court seems to imply, that certain facts stated in the bill, if admitted, would have defeated the relief sought. The court cites no authority to support this holding, but bases it entirely upon the ground that important questions are involved, and that the opposite ruling would result in hardship to the complainant. The decision may be accounted for upon the ground that equity pleading is somewhat more flexible than pleading at law. It is, undoubtedly, desirable that a case of so great importance should be tried upon its merits. However, this result could have been reached by sustaining the demurrer and allowing the complainant to amend his bill, — a course that would not have involved so radical a departure from the well-settled rules of pleading. See *Schneider v. Lizardi*, 9 Beav. 461, 468; I. DANIELL, CHAN. PRAC., 6th ed. 544.

**PROCEDURE — REVERSIBLE ERROR — PREJUDICIAL REMARKS BY COURT.** — The court, in overruling a motion for a continuance supported by affidavits of the defendant and his counsel, imputed to them perjury, and accused them of an attempt to bolster up their cause by securing false testimony. *Held*, that the remarks, being overheard by the jurors, constitute reversible error, though the jury had not at the time been empanelled. *Allen v. United States*, 115 Fed. Rep. 3 (C. C. A., Ninth Circ.).

The general rule is that a party who knows of any prejudice entertained by a juror and makes no challenge when the jury is empanelled, is deemed to have waived his right. *Lisle v. State*, 6 Mo. 426; and see *Fox v. Hazleton*, 10 Pick. (Mass.) 275, 278. It is well known that jurors attribute great weight to any remarks, bearing upon the facts, made by the court. And undoubtedly the remarks of the court in the principal case so prejudiced the jurors as to render them wholly unfit to serve, and constituted cause for challenge. Yet it is probable that a court after making such remarks would have overruled any objections to the jurors on the ground of bias so created. And while the defendant might have carried the case up regularly on exceptions to such ruling, yet it would seem only proper, where the trial court has been so obviously unfair, that it should be reproved and the defendant fairly dealt with by the grant of a new trial. The cases are to this effect. *Bowman v. State*, 19 Neb. 523; *Peebles v. State*, 103 Ga. 629.

**PROPERTY — COVENANT NOT TO ASSIGN LEASE WITHOUT CONSENT OF LESSOR — EFFECT OF MORTGAGE BY LESSEE.** — A lease contained a covenant against assignment without the lessor's consent, with a condition for re-entry in case of breach. The lessee, without such consent, mortgaged the lease as security for a debt. Under Michigan law a mortgage has the effect of a lien. *Held*, that the condition is not violated. *Crouse v. Mitchell*, 90 N. W. Rep. 32 (Mich.).

The well-known hostility of the courts towards conditions imposing forfeiture leads to a uniformly strict construction of all such covenants. Thus the particular covenant against assignments is held not to include involuntary transfers. *Farnum v. Hefner*, 79 Cal. 575. Similarly it is held not to be violated by an agreement to assign, or by a bond for conveyance, or by an equitable mortgage. *Bristol v. Westcott*, 12 Ch. D. 461; *Mayhew v. Hardesty*, 8 Md. 479; *Doe d. Pitt v. Hogg*, 4 D. & R. 226. A like result has been reached in other cases where for various reasons the lessee's acts have failed to pass his entire legal interest. See *Croft v. Lumley*, 6 H. L. Cas. 672; *Doe d. Lloyd v. Powell*, 5 B. & C. 308. The effect of the decisions is thus to limit the scope of the covenants to direct voluntary assignments of the legal estate. The principal

case harmonizes with this distinction and reaches a correct result. The same view has been adopted in New York where the lien theory of mortgages is accepted. See *Riggs v. Pursell*, 66 N. Y. 193. On the other hand, under the common law view of mortgages, the transfer would seem necessarily to be construed as a violation of the covenant; and such was, in fact, the decision in *Becker v. Werner*, 98 Pa. St. 555.

**PROPERTY — PLEDGE OF MEMBERSHIP IN A STOCK EXCHANGE.** — The defendant's intestate pledged his membership in the stock exchange to the plaintiff, as collateral security for a note. The seat was transferable only to some one who had been elected to the exchange. After the death of the intestate, the seat was sold, and the plaintiff claimed a lien on the proceeds of the sale. *Held*, that the plaintiff can recover, since the seat is property and can be pledged. *Nashua Sav. Bank v. Abbot*, 63 N. E. Rep. 1058 (Mass.)

The case is in accord with the great weight of authority. *Hyde v. Woods*, 94 U. S. 523; *Londheim v. White*, 67 How. Pr. 467; *Fish v. Fiske*, 154 Mass. 302; *Habenicht v. Lissak*, 78 Cal. 351. In Pennsylvania, however, garnishee process against the members of the exchange was denied, and the court declared that a seat on an exchange was not property subject to execution in any form. *Pancoast v. Gowen*, 93 Pa. St. 66. The Supreme Court of Illinois has adopted the same view, reiterating that such membership is merely a personal privilege, or license to buy and sell on the floor of the exchange. *Barclay v. Smith*, 107 Ill. 349. The ground of these latter decisions seems to be that the owner has not an absolute power to dispose of the seat. The rule of the principal case is clearly much to be preferred. True, the owner's power of disposal is qualified; but it is hard to see why that should be decisive. The seat is a valuable asset, and should not be withheld from the owner's creditors by mere force of a narrow and inadequate definition of property.

**TAXATION — EXEMPTIONS — LEASED PARSONAGE.** — A parsonage was rented to an outsider and the income derived therefrom was appropriated to the salary of the pastor, who for his own convenience had rented a residence in another locality. *Held*, that under the provisions of the Constitution of South Carolina, art. 10, § 4, relating to exemptions, the parsonage was not liable to taxation. *Protestant Episcopal Church, etc., v. Priolean County Auditor*, 40 S. E. Rep. 1026 (S. C.).

Under the varied legislative provisions exempting from taxation the property of religious, educational, and charitable institutions, a proper and almost uniform result has been attained by the courts in holding that the property of such institutions shall cease to be exempt when it is occupied for purposes other than those directly connected with their objects and work, and that property used for revenue solely is subject to be taxed. *President, etc., of Harvard College v. Assessors of Cambridge*, 175 Mass. 145; see 19 L. R. A. 289. In the principal case the court reached an opposite result by holding, first, that the constitution does not except from exemption a parsonage used otherwise than as a pastor's home; and, secondly, that the property, though rented, was nevertheless a parsonage within the meaning of the exemption clause. Whether or not one can agree with the court, on the second point, it seems evident from an examination of the constitution, that the intention there manifest, that a parsonage shall not be exempt when it ceases to be used as a parsonage, finds sufficient expression in the rather obscure language employed.

**TORTS — DUTY OF LANDLORD TO NOTIFY TENANT OF HIDDEN DANGERS IN LEASED PREMISES.** — The tenant was injured by the fall of a chimney, carelessly left by the landlord in a dangerous condition, the danger being known to the landlord and neither patent nor known to the tenant. *Held*, that since the lease contains no express or implied promise that the premises are safe, the tenant cannot recover. *Land v. Fitzgerald*, 52 Atl. Rep. 229 (N. J.).

A landlord knew of the presence of sewer gas in the leased premises. He failed to disclose the fact to the tenant, and the latter, being ignorant of it, was injured by the gas. *Held*, that the landlord is bound to notify the tenant of hidden dangers of whose existence he knows. *Sunasack v. Morey*, 196 Ill. 569.

A third view of the legal status of the tenant in cases of this kind is adopted by the Supreme Court of Tennessee, which gives him the rights of one on the premises by invitation, imposing on the landlord the duty of making reasonable examination to discover hidden defects. *Hines v. Willcox*, 96 Tenn. 148. The rule adopted by the Illinois court making his rights similar to those of one on premises by the license of the owner, seems to be supported by the weight of authority. *Cowen v. Sunderland*, 145 Mass. 363; *Cesar v. Karutz*, 60 N. Y. 229. This view appears the more reasonable. The fact that the prospective tenant is, from his situation, thrown on his guard, and that he may protect himself by the terms of his lease, may properly put on him



the burden of the examination, for defects not known to the landlord. But when the landlord is aware of hidden dangers, the fair rule is to require him to inform the tenant. The New Jersey Court treats the action as if founded on an implied promise instead of tort. The two authorities cited in the case do not justify the decision, for in both the tenant himself had actual knowledge of the danger. *Clyne v. Helmes*, 61 N. J. Law 358; *Mullen v. Rainear*, 45 N. J. Law 520.

**TORTS—LIBEL—PRIVILEGE DEPENDENT UPON USE OF DUE CARE.**—The defendant, a mercantile agency, received a report from an agent, that the plaintiff had made an assignment to secure the assignee for indorsing a note. The agency, in a notice sent to its subscribers, stated that the plaintiff had made an assignment for the benefit of his creditors. *Held*, that the continuance of the privilege arising from the occasion is dependent upon the exercise of due care in forwarding the information. *Douglass v. Daisley*, 114 Fed. Rep. 628 (C. C. A., First Circ.).

It is generally assumed that a conditional privilege may be rebutted only by proof of actual malice. *Clark v. Molyneux*, 47 L. J. Rep. C. L. 230; POLLOCK, TORTS, 6th ed., 260, 268. In practice this view is favorable to the defendant, as it is difficult to prove the existence of malice. To offset this advantage on the part of the defendant, it has been held in some American jurisdictions, that absence of reasonable cause for belief in the truth of the publication will destroy the privilege. *Carpenter v. Bailey*, 53 N. H. 590; *Express, etc., Co. v. Copeland*, 64 Tex. 354. The holding in the principal case seems to be in accord with this rule, reasonable ground for belief being dependent upon the exercise of reasonable care in ascertaining the truth of the subject matter of the publication. See *Toothaker v. Conant*, 91 Me. 438. The decision finds support in the closely analogous cases dealing with reports of judicial proceedings, which are privileged if fair and honest. *Usill v. Hales*, 3 C. P. D. 319. It seems reasonable that the right arising from a privileged occasion should be lost if carelessly or unreasonably exercised. On principle, therefore, the decision appears correct.

**TORTS—MALICIOUS PROCUREMENT OF EMPLOYEE'S DISCHARGE.**—The defendants, who were officers in labor unions, combined to prevent the plaintiffs, who were members of a rival organization, and who were employed from day to day, from being employed upon any building upon which the defendants' men were working, and in several instances procured the plaintiffs' discharge by threat of a strike. *Held*, that the defendants could not be enjoined from so doing. *Nat. Protective Ass'n, etc., et al. v. Cumming et al.*, 170 N. Y. 315.

The appellant corporation, on account of the appellee's refusal to compromise a claim against it, procured his discharge by threatening to cancel a policy held by his employer in the appellant corporation. *Held*, that the appellee could recover the damages suffered by reason of his discharge. *London Guarantee, etc., Co. v. Horn*, 101 Ill. App. 355. For a discussion of the questions involved, see 15 HARV. L. REV. 402; 8 HARV. L. REV. 1.

**TORTS—MALICIOUS PROSECUTION OF CIVIL SUIT.**—*Held*, that an action will lie for the malicious prosecution of a civil suit where there has been no arrest of the person nor seizure of property. *Wade v. National Bank, etc., of Tacoma*, 114 Fed. Rep. 373 (Circ. Ct., Wash.). For a discussion of the question involved, see 12 HARV. L. REV. 358.

**TRUSTS—DISTRIBUTION BETWEEN LIFE TENANT AND REMAINDERMAN.**—A corporation whose shares were held in trust, instead of declaring dividends laid by its earnings in the form of a surplus. The trustee sold the stock. *Held*, that the increase in price due to earnings made by the corporation during the life tenancy is income and goes to the life tenant. *Simpson v. Millsaps*, 31 So. Rep. 912 (Miss.). See NOTES-P. 54.

## BOOKS AND PERIODICALS.

"RIGHT TO PRIVACY." — Few recent cases have caused more comment and criticism than the case lately decided by the New York Court of Appeals, in which the plaintiff, a young woman of attractive appearance, was refused an injunction to restrain the use of her likeness as a trade advertisement. *Roberson v. Rochester, etc., Co.*, 171 N. Y. 538. The critics generally deplore the result, but they differ as to where to lay the blame. Of those who criticise the court adversely, Mr. Gordon, writing in the August number of the CANADIAN LAW TIMES, is a fair exponent. *The Right of Privacy*, by Wm. Seton Gordon, 22 Can. L. T. 281 (Aug., 1902). To his mind the right to privacy is an existing right, distinct alike from the right to reputation and from property rights. He entertains the view that protection might well be granted by means of the "undoubted jurisdiction of equity to restrain unfair practices in trade." This suggested basis of the alleged right to privacy seems extraordinarily narrow, since conceivably there may be serious infringements of that right entirely apart from trade matters. Furthermore jurisdiction over unfair practices in trade forms only one manifestation of the power of equity to restrain irreparable injury to person or property. For in spite of the fact that equity jurisdiction arose in questions involving property only, it is now well settled that it has extended to protect personal rights. See *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227. The personal right to privacy, the right to be let alone, is one which must ultimately be recognized in these days when curiosity-seekers are rampant. The New York court was avowedly fearful of establishing a precedent which would open the door to a multitude of frivolous claims. But this danger seems to have been magnified, as the plaintiff must always have the burden of proving actual damage or suffering, and the court would have that large discretion necessarily inherent in courts of equity.

Of those who consider that the law was properly administered, and that legislative action is necessary to give the plaintiff legal rights, Mr. Adams, counsel for the defendant, is the strongest advocate. See *The Law of Privacy*, by E. L. Adams, 175 No. Am. Rev. 361. He suggests that the subject involves an extension of the law of libel, to cover the redressing of spiritual as well as of material wrongs. From this premise he concludes that, apart from any question of a remedy at law, under the acknowledged limitations of equity no injunction could possibly have been granted. That the New York courts will not enjoin the publication of a libel is now, unfortunately, settled by the recent case of *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384. This decision is another exemplification of judicial reluctance to establish a new, though desirable, precedent. Whether or no the alleged right to privacy is analogous to the right to reputation, it seems certain that some remedy must be found for such abuses as are declared legal by the New York decision. It was to be hoped that the "courts of conscience" would prove elastic enough to meet this modern need. But apparently such is not to be the case, and we must look hereafter to the legislatures.

For a more thorough discussion of this subject, see 4 HARV. L. REV. 193.

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MUTUALITY OF REMEDY IN SPECIFIC PERFORMANCE. — The question whether mutuality of remedy is a prerequisite of specific performance is made the subject of a recently published article. *Mutuality in the Enforcement of Contracts for Personal Service*, by Henry W. Bond, 55 Central L. J. 64 (July, 1902). The conclusion is there reached that "according to the established law" mutuality of remedy is unnecessary; in other words, that

the contract need not be one which equity would enforce at the suit of either party.

It is usually said that such mutuality is essential. See *Flight v. Bolland*, 4 Russ. 298; *Norris v. Fox*, 45 Fed. Rep. 406; FRY, SPEC. PERF., 3d ed., 215. The courts have, however, always applied the rule cautiously, and many jurisdictions have disregarded it in several classes of cases. Among these are cases in which only the defendant has signed a memorandum sufficient under the Statute of Frauds, and those in which the plaintiff is a married woman who might, were she the defendant, defeat a bill for specific performance by avoiding her contract. *Halton v. Gray*, 2 Ch. Cas. 164; *Fennelly v. Anderson*, 1 Ir. Ch. Rep. 706. But in spite of such exceptions the rule in its broadest form is still frequently applied both in contracts involving personal service and elsewhere. *Welty v. Jacobs et al.*, 171 Ill. 624; *Solt v. Anderson*, 89 N. W. Rep. 306 (Neb.). The statement, therefore, that mutuality of remedy is unnecessary "according to the established law" seems questionable.

While the author's statement of the law is perhaps inadequate, his general treatment is suggestive. The doctrine as broadly stated is technical, and if indiscriminately applied would sacrifice the justice of particular cases to the maintenance of a rigid rule. It is true that in many instances where a decree of specific performance would work hardship on the defendant, the principle of mutuality is properly invoked to prevent an inequitable result; for example, when the defendant has contracted to do an immediate act in return for the plaintiff's promise to render personal service in the future, — a promise which, of course, a court of equity would not specifically enforce. Here equity properly declines to grant its extraordinary relief against a defendant who has, in his turn, no similar assurance that the plaintiff will fulfill his promise. *Alworth v. Seymour*, 42 Minn. 526. But from such instances the doctrine of mutuality would seem no longer to exist as a distinct and independent principle, but to be merely an expression or application of the fundamental rule that a court of equity will never allow itself to be made an instrument of injustice. On this view, apparently, specific performance should be refused for lack of mutuality of remedy only where, on the facts of a particular case, such mutuality is necessary to carry out the objects of the contract with fairness to both parties. So if the decree would in effect compel performance by both parties, it should not be held an objection that performance by the plaintiff was not at first specifically enforceable, as in the case of coverture cited above. This principle apparently underlies the decisions in a number of jurisdictions. *Fennelly v. Anderson*, *supra*; *Borel v. Mead*, 3 N. Mex. 39. It also seems to be endorsed in a recent Pennsylvania case, which is adopted as the text of the article referred to above. *Philadelphia Ball Club v. Lajoie*, 51 Atl. Rep. 973 (Pa.). While, therefore, it cannot be said to be settled law that mutuality of remedy is required only when the just solution of the case in question demands it, there appears to be a tendency toward the adoption of that view.

It may be added that the question of mutuality discussed in the case last cited is not the ordinary one as to mutuality of remedy. The contract there contained a provision that the plaintiff might at any time end it on ten days' notice. It was urged that this provision deprived the contract of mutuality. A similar objection has been held fatal in other jurisdictions. *Rust v. Conrad*, 47 Mich. 449. But the decision in the Pennsylvania case seems the sounder, as it fulfills the terms of the contract without hardship on either party. It is also supported by several other decisions. *Franklin, etc., Co. v. Harrison*, 145 U. S. 459; *Singer S. M. Co. v. Union, etc., Co.*, Holm. (U. S. Circ. Ct.) 253.

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THE COAL MINES AND THE PUBLIC. A Popular Statement of the Legal Aspects of the Coal Problem, and of the Rights of the Consumers as the Situation exists September 17, 1902. By Heman W. Chaplin. Boston & New York: J. B. Millet Company. 1902. pp. 63.

In the midst of arms the laws are silenced; that is the danger in time of industrial storm as it is in time of military stress. The fear at the time this

pamphlet is laid before the public is that the urgent necessity for fuel will lead to overriding all legal rights in the premises, rather than that all the established remedies of the law will not be employed. That is, the peril in the situation as it is at this writing is not that the trade dispute will not be brought to a settlement by inner forces, but that some great change will be worked in the law in the present exasperation. At such a time, more than at any other, he who asserts the necessity of an extension in the law must prove its propriety in such a way as to commend it to calm judgment. The position taken in this pamphlet, that the coal operators of Pennsylvania are engaged in a public calling and therefore are subject to governmental control, involves an examination into the division between public callings and private callings. For if these coal operators be in public calling they must serve all who apply with adequate facilities for reasonable compensation and without discrimination; whilst if they be in a private calling they may refuse coal to any one, produce as little as they please, charge any price, make any terms. It is the premise that requires legal discussion, for the conclusions will be accepted without citation. Mr. Chaplin is very sound in his exposition of these rules and very apt in his illustration of them. Upon one point, in particular, of first importance in the present crisis, his discussion leaves nothing to be desired. The problem put is: if these coal operators are in public calling, will the fact that their employees quit work excuse them? As Mr. Chaplin points out, the strike in itself is no excuse; a railroad, for example, must provide men to run its locomotives as much as it must provide other facilities; on the other hand, the existence of mob violence is a defence (advance sheets of new edition). The examination of these details is important work; for upon the successful working out of these rules depends to a large extent the maintenance of the present order of things based upon private ownership and public regulation.

It is to his premise, not to his conclusions, that one must address himself if he is to dispute Mr. Chaplin. On September 17, 1902, was supplying coal public business or private business? That is the issue he propounds, — a problem more of economics and fact than of law and reason. To determine this, Mr. Chaplin uses as the basis of his discussion, as every such inquiry must, a passage in *Munn v. Illinois*, 94 U. S. 113: "Property does become clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created." General phrases these, so general as to require for their understanding the examination of many examples. Carriers by land and sea, innkeepers and warehousemen, telegraph and telephone companies, purveyors of light and water. — all these are by the decisions held to be in public calling; and yet the department store and the cotton press, the grocer and the undertaker, the newspaper and the circus, — these by the reports are in private calling. Mr. Chaplin surely argues without these diverse cases in mind when he says (p. 24) that "whoever so conducts his property or his business as to enter into relations with the public and leads them to depend upon his services and the use of his property, thenceforth holds his property and his services no longer as private property, but subject to a superior and dominating interest in the public." Clearly not every one who professes to serve the public is in public calling, nor does every public need make those in public calling who supply it; the inquiry must go deeper.

Mr. Chaplin brings forward a test more worth discussion on p. 26, — virtual monopoly. Undoubtedly much may turn upon that; because here we touch the economic foundation of the division between public and private calling, — in one class those businesses left to the regulation of competition, in the other class those industries which have the situation in their own control, because freed from competition. How now do the facts stand in the business of supply of fuel, if you grant, without more proof, a present virtual monopolization, — a fact by no means established? The discussion most in point known to the

writer of this review, is in the opinions of the justices, 155 Mass. 598. There the question was as to the constitutionality of the proposition for the operation of municipal coal yards; upon that question five of the justices said that this was a well-known form of private business, — not differing essentially from the trades of buying and selling other necessities of life; the two dissenting judges dwelt upon the power of the law to meet all public needs. Mr. Chaplin pleads throughout that because of the present exigency the common law principle extends far enough to make out public calling in the present case. What he fails to consider is what consequences would follow, because of the force of a decision at common law in fixing a class for all future cases. Suppose a decision upon a writ of mandamus is handed down this month that coal mining, as it is conducted by the combination in Pennsylvania, is public calling because of the virtual monopoly; suppose, then, that next month the pool is broken and the seventy-five companies enter into competition, — does the business now revert to private calling? If you have one grocery in a town, that does not make it public calling, to revert to private calling when a new store is opened. Such a shifting of the position of things back and forth is hardly possible as a legal state of things. The law moves only in reference to conditions established by long experience, fixed upon stable foundations. Unless we restrict the unusual class of public callings to that situation where there is a permanent control of the service in the nature of things, we lay all industries open to public operation; that means the changing of our theory of the state from individualism to socialism.

B. W.

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**THE LAW OF VOID JUDICIAL SALES.** The Legal and Equitable Rights of Purchasers at Void Judicial, Execution, and Probate Sales, and the Constitutionality of Special Legislation validating Void Sales and authorizing Involuntary Sales, in the Absence of Judicial Proceedings. Fourth edition. By A. C. Freeman. St. Louis: Central Law Journal Company. 1902. pp. 341. 8vo.

What is said of the third edition of this book in 4 HARV. L. REV. 97, is equally true of the fourth edition. The author deserves praise for his clear and logical treatment of a troublesome topic. Some simple theories are propounded which should help to solve the legal difficulties frequently arising in cases of execution and judicial sales. As a text-book on a branch of the law that is of interest primarily to the practitioner, the volume will surely prove to be a work of great usefulness, — in fact, a standard manual on its subject.

While the plan and scope of this edition are essentially the same as those of the third edition, material additions are made to the subject-matter and the number of citations is nearly doubled. The alteration in the title can, however, hardly be regarded as a change for the better. The former title, beginning "Void Execution, Judicial, and Probate Sales," is more comprehensive and at the same time more exactly descriptive of the contents of the work than the present heading.

A. L.

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**VISUAL ECONOMICS,** with Rules for the Estimation of the Earning Ability after Injuries to the Eyes. By H. Magnus and H. V. Würdemann. Milwaukee: C. Porth. 1902. pp. 144. 5 plates. 8vo.

This book, which is designed to present to American readers the work of Professor Magnus, is an adaptation, rather than a translation, of the latter's German treatise. It enters upon a field hitherto almost wholly unexplored by English and American writers, namely, the scientific calculation of the economic values of bodily functions and the deduction of mathematical formulas designed to furnish a basis for determining the extent to which those values are impaired by injuries to the functions. The writers begin with a careful analysis of the elements entering into the complete earning capacity of individuals possessed of normal eyesight; they then evolve a formula by which to estimate the effect produced upon this "visual earning ability" by any



injury to the eyes, as it may affect directly the functional power of the eyes themselves, or indirectly the individual's ability to compete in the labor market.

The extent to which mathematical formulas or tables can be used in legal proceedings would seem logically to depend upon the accuracy of the results that will be attained by their use. Where a formula is susceptible of rigid demonstration, it might very properly be given to a jury with a direction to use it as a basis for computing damages, the court merely taking judicial notice of the accuracy of the mathematical processes involved. Absolute exactness, however, would be required to justify such a mandatory use. A formula of this sort has recently appeared in these pages. See 15 HARV. L. REV. 866.

Another possible mode of dealing with formulas is suggested by the familiar use made of mortality tables. These are admissible in evidence, as embodying tabulated results from actual experience; the doctrine of judicial notice is invoked only to the extent of recognizing them as accurate embodiments of these results. Formulas like that of Professor Magnus, however, differ from the one suggested above, in that they are incapable of rigid demonstration because of the obvious necessity of making certain arbitrary suppositions in expressing natural powers in mathematical terms. On the other hand, they are like the mortality tables in being based on experience and investigation; but, unlike these, they are not mere tabulations of results, but are dependent for their value upon the soundness of judgment of the maker. Accordingly, the necessity of proving such formulas and the complexity of issues thereby raised would seriously affect their usefulness as evidence either by themselves or in support of an expert's testimony, if it did not, in fact, render them inadmissible. Nevertheless they undoubtedly indicate a movement in the right direction, aiming as they do to reduce to a minimum the element of conjecture so prominent in jury trials.

Finally, the writers maintain that their formula will be useful to accident insurance companies and pension bureaus, in adjusting claims and granting pensions; but such a use must, in this country, be limited, because of the extensive use of valued policies, and because pensions depend so largely on the rank of the pensioner.

THE RIGHT TO AND THE CAUSE FOR ACTION, both Civil and Criminal, at Law, in Equity and Admiralty, under the Common Law and under the Codes. By Hiram L. Sibley, Circuit Judge in the Fourth District of Ohio. Cincinnati: W. H. Anderson & Co. 1902. pp. x, 165. 8vo.

If clear apprehension and exact statement conduce to sound law, the present work may be unhesitatingly commended. Dealing with a subject that is elementary and yet vitally important because fundamental, it presents the author's views in a simple, convincing manner. He seldom indulges in unnecessary verbiage, but nevertheless suggests ample illustration for each proposition.

His main contentions are that "the right to action arises wholly by force of the remedial law when a legal wrong has been committed" and is independent of the substantive law; and that the cause for action is simply a legal wrong, as distinguished, on the one hand, from the substantive law, which merely conditions it, and, on the other, from the remedial law, which only gives it an avenue of redress. These propositions he ably defends, pointing out the certain value of their application to the law of Parties, to Pleading, and to the sometimes difficult problem of determining the *locus* of the cause for action.

In supporting his contention that "a wrong in every case implies a cause for action and *vice versa*," Judge Sibley (on p. 28) takes issue with a statement made by Mr. Justice Holmes in his familiar work on the Common Law. The latter, at p. 148, says: "It cannot be inferred from the mere fact that certain conduct is made actionable, that therefore the law regards it as a wrong or seeks to prevent it. Under our mill acts a man has to pay for flowing his neighbor's lands, in the same way that he has to pay in trover for converting his neighbor's property. Yet the law approves and encourages the flowing of lands for the erection of mills." In reply to this Judge Sibley suggests that "it is not the act of flowing lands which is actionable, but the failure to com-

pensate the owner;" that, until there has been such a default in payment, there is no cause for action; and that consequently even in a class of cases which might at first seem exceptional there is no cause for action without a legal wrong. It would seem hardly possible to deny the correctness of the author's position.

It is perhaps true that the book is not without some minor deficiencies. However logical and sound the author may be in his conclusions, it may be questioned whether they are affirmatively supported by all the cases he cites; the cases relating to the statute of limitations seem especially open to comment.

A carefully prepared index and tables of cases are included in the volume, though perhaps of doubtful advantage in a work so short. The book as a whole will amply repay at least brief perusal by lawyer and judge. For beginners in the law a careful reading of it would serve as an excellent preparation for the systematic study of Pleading.

**A TREATISE UPON THE LAW OF COPYRIGHT** in the United Kingdom and the Dominions of the Crown and in the United States of America, containing a Full Appendix of all Acts of Parliament, International Conventions, Orders in Council, Treasury Minutes and Acts of Congress now in Force. By E. J. MacGillivray. London: John Murray. New York: E. P. Dutton & Co. 1902. pp. xxxvi, 403. 8vo.

**MASON ON HIGHWAYS**, containing the New York Highway Law and all Constitutional and General Statutory Provisions relating to Highways; Highway Officers, their Powers and Duties, including the Good Roads Law of 1898 and 1901, all as amended to the Session of 1903: with Annotations and Forms. By Herbert Delavan Mason. Albany: Banks & Company. 1902. pp. xxxi, 322. 8vo.

**THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF THE SALE OF GOODS**, in the form of Rules with Comments and Illustrations, containing also the English "Sale of Goods Act." Second edition. By Reuben M. Benjamin. Indianapolis and Kansas City: The Bowen-Merrill Company. 1901. pp. x, 401. 8vo.

**OUTLINES OF CRIMINAL LAW**, based on Lectures delivered in the University of Cambridge. By Courtney Stanhope Kenny. Cambridge (England): The University Press. New York: The MacMillan Company. 1902. pp. xxii, 528. 8vo.

**REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES**, submitted to Hon. Elihu Root, Secretary of War. By Charles E. Magoon. Washington: Government Printing Office. 1902. pp. 808. 8vo.

**PROBATE REPORTS ANNOTATED**, containing Recent Cases of General Value decided in the Courts of the Several States on Points of Probate Law; with Notes and References. By George A. Clement. Vol. VI. New York: Baker, Voorhis & Company. 1902. pp. xlv, 832. 8vo.

**THE EMPLOYERS' LIABILITY ACTS AND THE ASSUMPTION OF RISKS**, in New York, Massachusetts, Indiana, Alabama, Colorado, and England. By Frank F. Dresser. St. Paul: Keefe-Davidson Company. 1902. pp. xii, 881. 8vo.

**MORPHINISM AND NARCOMANIAS FROM OTHER DRUGS**, their Etiology, Treatment, and Medico-Legal Relations. By T. D. Crothers. Philadelphia and London: W. B. Saunders & Company. 1902. pp. 351. 8vo.

**A BRIEF FOR THE TRIAL OF CRIMINAL CASES**. By Austin Abbott, assisted by William C. Beecher. Second edition. Rochester: The Lawyers' Co-operative Publishing Company. 1902. pp. xx, 814. 8vo.

**SOCIOLOGIC STUDIES OF A MEDICO-LEGAL NATURE.** By Louis J. Rosenberg and N. E. Aronstam. Introduction by Clark Bell. Chicago: G. P. Engelhard & Company. 1902. pp. 137. 12mo.

**BRITISH RULE AND JURISDICTION BEYOND THE SEAS.** By Henry Jenkyns. Preface by Courtenay Gilbert. Oxford: Clarendon Press. 1902. pp. xxiii, 300. 8vo.

**A BRIEF OF NECROSCOPY and its Medico-Legal Relation.** By Gustav Schmitt. New York and London: Funk and Wagnalls Company. 1902. pp. 186. 16mo.

**PROBATE LAW.** By M. D. Chatterton. 2 vols. Lansing: Robert Smith Printing Company. 1901. pp. lxxvii, 1-460; v, 461-1117. 8vo.

**JURISPRUDENCE, or the Theory of the Law.** By John W. Salmond. London: Stevens & Haynes. 1902. pp. xv, 673. 8vo.

**HISTORY OF THE LOUISIANA PURCHASE.** By James S. Howard. Chicago: Callaghan & Company. 1902. pp. 170. 8vo.

**REPORT OF SPECIAL AND REGULAR MEETINGS OF THE COLORADO BAR ASSOCIATION.** Vol. 5. 1902. pp. 276. 8vo.



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## A STATEMENT OF THE TRUST PROBLEM.<sup>1</sup>

A PROBLEM is easier of solution after it has been reduced to its lowest terms. The questions whether anything is to be done about the trusts, and if so what, may fairly be said to form the vital problem of the day. Until the word in its new meaning acquires that good usage in the realms of law which it has attained in popular discussion, a trust cannot be accurately defined. For convenience, however, we may describe a trust as a corporation representing the combination of previously independent interests and controlling over fifty per cent of the trade of a particular industry. To state the trust problem in what to the writer appears to be its approximately lowest terms is the endeavor of this paper.

There was no question in regard to trusts in the year 1800; there was no such question twenty years ago. If there is a trust problem to-day, it must be because certain definite facts exist now which did not exist a comparatively few years ago. What has happened to create the trust problem? This query opens for discussion a field vast and of indefinite limits. Any great movement, religious, political, or economic, is invariably obscured in the eyes of those who see its actual progress by accompanying manifestations not really germane to the movement itself. In trying to discover what has happened to create the trust problem, clearness requires that certain of such manifestations be mentioned. If

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<sup>1</sup> The evidence on which this paper is chiefly based may be found in the Report of the Industrial Commission created by act of Congress, approved June 18, 1898, vols. i., xiii., and xix.

many more are omitted it is because in dealing with so vast a subject we can hope to arrive at any end only by a resolute process of elimination. Thackeray's picture of Ludovicus Rex represents a figure six feet high, "majestic, imperial, and heroic." But in the picture of Ludovicus, when "the wig, the high-heeled shoes and cloak all fleur-de-lis bespangled" are taken away, we have a "little, lean, shrivelled, paunchy old man of five feet two." With much diffidence and it is hoped a proper regard for modesty, the writer has tried to apply this undressing process to the trust problem.

In the early history of this country business combinations took the form of partnerships. Not till the middle of the nineteenth century did the practice of combining to do business in the form of a corporation begin on any considerable scale. The next step was the combination of the interests of individual corporations. Railroads were the first to put the idea into practice, and then, the several interests which now form the Standard Oil Company. Within the last ten years combinations have been made of corporations engaged in nearly every industry carried on in this country. To furnish a standard for comparison the following figures are given. The total wealth of the United States according to provisional figures of the census of 1900 is \$90,000,000,000. The sum total of the railroad securities of the United States at par in 1900 was \$12,500,000,000.<sup>1</sup> In the Stock Exchange handbook for 1902 statistics are given of five hundred industrial corporations which represent the combination of previously existing independent interests. The securities of these five hundred industrial corporations actually issued are: bonds, \$1,327,941,111; preferred stock, \$1,833,899,251; common stock, \$4,318,616,061; total, \$7,480,460,423. These facts have created the trust problem.

To ascertain precisely what has been going on, it is necessary to follow back the history of these existing combinations. The story of the development of the movement of which these facts are the result must, however, within the limits of a short article, be told in general terms. The principle of combination has been the vital thing. This principle twenty years ago took form in the creation of the real trust. Here the several properties intended to be combined were transferred to individuals as trustees, who issued certificates of beneficial interest. These individuals managed the

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<sup>1</sup> Report of Industrial Commission, xix. 261.

business of the several combined properties, paying dividends on the certificates issued. Real trusts were not easily handled by the parties interested and were held to be illegal.<sup>1</sup> They are practically non-existent at present.<sup>2</sup>

Another form developed by the combination idea, second in point of importance, but probably prior in point of time, was the pool. Here several concerns engaged in a similar business agreed to regulate the selling price of the commodity produced; to divide the territory of the country among themselves; and generally to establish a community of interest. The pool was a looser form of combination than the real trust. The corporations forming it were not bound closely together in legal point of view; difficulty was sometimes found in holding the members up to their agreements, which were almost always of an informal nature. Further, pools are illegal,<sup>3</sup> though the extreme difficulty of securing evidence of the facts which make them pools has undoubtedly allowed many to flourish free from legal attack. With the incorporation of the Beef Trust pools too will become practically non-existent.

The third form which the combination idea took was the corporation. There is a radical, a fundamental difference between this form and the two preceding ones. Real trusts and pools are composed of the constituent corporations; the combining corporation *is* the constituent corporations. To give an analogous example, before the adoption of our Constitution there was a federation, a combination of states; after its adoption there was a nation which is the United States. Thus the corporation formed to combine various interests is a legal entity, a thing of and by itself. As far as results and effects go, it is a combination. In fact the corporation is the vehicle in which practically all the great combinations travel to-day.<sup>4</sup> We have arrived, then, as far as this: the desire for combination is the motive which creates the trust; the corporation is the form it takes.

Why have the formerly independent parts of the trust combined in any form? What is the basis of this desire for combination? Properly to answer these questions something by way of exclusion is at once necessary. We will limit the answer to the fundamental reasons; the reasons, of which as a natural development the com-

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<sup>1</sup> *People v. The North River Sugar Refining Co.*, 121 N. Y. 512.

<sup>2</sup> Report of Industrial Commission, xix. 607.

<sup>3</sup> *United States v. Addyston Pipe & Steel Co.*, 175 U. S. 211.

<sup>4</sup> Report of Industrial Commission, xiii. 6.

bination is the rational result. Further, in the first instance, we will exclude from our discussion the desire to put an end to competition. With these limitations the reasons why several corporations combine are as follows. The combination will have certain advantages which the individual corporations cannot possess.<sup>1</sup>

1. Opportunity for comparative administration and accounting among the several corporations merged.<sup>2</sup>

2. Ability to buy in large quantities and therefore cheaply.

3. More perfect organization.<sup>3</sup> This includes saving in salaries of higher officials. Where before there were paid vice-presidents and superintendents for each plant, there need now be only one superintendent and one set of higher officials for a district.

4. Ability to handle large orders.

5. Ability to sell in large quantities, and therefore at a smaller percentage of profit.

6. Ability to save charges of transportation by shipping from the plant nearest in location to the consumer.<sup>4</sup>

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<sup>1</sup> Report of Industrial Commission, xii. 6. "The Trusts," W. M. Collier, p. 61.

<sup>2</sup> Testimony of E. H. Gary, now Chairman of Direction of U. S. Steel Corporation, before the Industrial Commission. "For instance I do not care what plant one goes into, there are beneficial features in that plant that are not in other plants." Report of Industrial Commission, i. 985.

Testimony of Charles S. Guthrie, President of the American Steel Hoop Company. "Then we have the benefit of the good work of one mill to compare with that of another. If one mill makes 12 inch stuff, 10 or 9 inch stuff, different sizes, and gets out 60 tons and another 40, we can say to the one that got out 40, 'What is the trouble, this other mill gets out 60?'" Ibid. i. 953.

<sup>3</sup> Testimony of Charles M. Schwab before the Industrial Commission. "The steel-making industry is peculiar in this, that no matter how small the operations are, there are skilled men in each line necessary. If a firm has two furnaces or fifty furnaces, they can't do without one skilled man in each of their lines, as a skilled melter, skilled superintendent, skilled chemist, skilled draftsman, and so on down the line. Now, we can consolidate all these industries, we can have one selling man, for example; one chief chemist, one chief engineer, that will answer all purposes for all these works by adopting the same method at each of the works." Ibid. xiii. 451.

<sup>4</sup> Testimony of Archibald S. White, President of the National Salt Company, before the Industrial Commission. "All salt sold is delivered at point of consumption, not at point of production. Of that delivered, from 30% to 60% of the price constitutes freight; therefore each producing section should naturally supply the territory contiguous thereto. This was not always the case, however, as salt manufactures in some localities were not acceptable in quality to purchasers. As a result, salt was shipped to distant and unnatural markets, paying freight thereon equal and sometimes exceeding the value of the salt at the point of production. Reforms have been made by producing a uniform quality of salt of a standard grade of manufacture in each of the producing districts, and an economy has been effected by supplying markets from the nearest point of production at the lowest prevailing freight rate." Ibid. xiii. 253.

7. Ability to utilize waste.
8. Opportunity for experimentation.
9. Ability to specialize labor.

These reasons for combining may be also described as the economic benefits of combination. In later parts of this paper this designation will be used to refer to them. They are the gist of the combination idea; the inherent, inevitable incidents of the abstract fact of combination. They may be loosely summed up by the phrase, "In union there is strength."<sup>1</sup>

The desire to put an end to competition was excluded. It is not of the essence of the abstract principle of combination. Practically it is the cause of all others which has led to the formation of combinations.<sup>2</sup> Why does the desire to end competition exist? Let us, in the first instance, limit our answer to reasons which rest on a sound economic basis. Besides lacking the economic benefits of combination, competing enterprises labor under certain more evident disadvantages. Each is bound to secure trade. Effort in this direction leads to large expenditures for advertising, to employment of a great number of traveling salesmen, and to cutting of prices. This tends to reduce the profits of the competing concerns to a minimum; sometimes it results in no profit at all, and occasionally in actual loss. The two causes of competition are found in fundamental traits of human nature: First, on the part of the consumer, the desire to buy at the cheapest possible price; second, on the part of the producer, the wish to increase the volume of his business. If the competitors join forces, form a combination, they will remove this pressure of competition. The combination which puts an end to competition gains the following economic advantages:

1. It can dispense with many traveling salesmen.<sup>3</sup>
2. Its expenditures for advertising will be less. Twenty soap manufacturers to advertise their goods must take twenty pages of a

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<sup>1</sup> Testimony of John D. Rockefeller, President of the Standard Oil Company, before the Industrial Commission. "Much that one man cannot do alone two can do together, and once admit the fact that co-operation, or, what is the same thing, combination, is necessary on a small scale, the limit depends solely on the necessities of the business." Report of Industrial Commission, i. 796.

<sup>2</sup> Ibid., Summary of Conclusion, i. 9, xiii. 5.

<sup>3</sup> Testimony of Charles R. Flint, Treasurer of the United States Rubber Company.

"Q. Can you give us any more definite data with reference to the number of traveling men whose services have been dispensed with in the United States Rubber Company?

"A. There has been a saving of 25 %." Ibid. xiii. 35.

magazine; the combination can advertise its various brands on one or two pages of the magazines; it can also make better rates.<sup>1</sup>

3. It is in a stronger position to regulate credits.<sup>2</sup> Eagerness to do business renders competing concerns careless and sometimes deliberately venturesome in selling goods on credit. The combination is freer to be discreet in the matter of credits, and its percentage of bad debts is much smaller than was the percentage of bad debts of the constituent companies.

4. It can regulate production.<sup>3</sup> The combination controlling, we will say, eighty per cent of the trade in a particular industry, can estimate the demand for the products of that industry, and make the supply correspond. Overproduction leads to panics, and subsequently to business depression and stagnation. To make the supply equal the demand tends to promote even conditions in trade, steady employment of labor, and in general to secure a rational calm in business circles.<sup>4</sup>

These advantages of the combination may be summed up as a saving of the wastes of competition. In later parts of this paper this designation will be used to refer to them.

We have thus far given only those reasons for desiring to end competition which rest on a sound economic basis. There is, however, another reason for wishing to end competition, namely, the desire to create a practical monopoly. The combination which becomes a practical monopoly has, from its own point of view, the following advantages. It has the power to control the situation, to dictate terms to the laborer, and to fix rates for the consumer. In later parts of this paper this power will be designated monopoly control. There is no question that many of the great combinations have been formed with precisely this intent and purpose.<sup>5</sup> To sum up, as far as we have gone, the fundamental

<sup>1</sup> Report of Industrial Commission, xix. 611.

<sup>2</sup> Testimony of John W. Gates, President of the American Steel and Wire Company, before the Industrial Commission. "If a man does not pay according to terms, we are a little more strict with him." *Ibid.* i. 1030. And testimony of Charles R. Flint, Treasurer of the United States Rubber Company. *Ibid.* xiii. 36.

<sup>3</sup> *Ibid.*, Summary of Conclusions, xiii. 6.

<sup>4</sup> Collier on Trusts, p. 63.

<sup>5</sup> Testimony of John W. Gates before the Industrial Commission.

"Q. What are the chief causes of the formation of your Company? Was it this same competition?"

"A. It was because we wanted to be the wire manufacturers of the world." Report of Industrial Commission, i. 103.

Testimony of H. O. Havemeyer, President of the American Sugar Refining Company, before the Industrial Commission.

reasons why combinations are made are, (1) to secure the economic benefits of the fact of combination, (2) to save the wastes of competition, (3) to create a practical monopoly.

There are certain spurious reasons why combinations are made which may be better understood after some account of the manner in which combinations are brought into being. In the first place, the combination is in form a corporation. This corporation either owns the plants, the actual property of the constituent companies, or all the stock of the constituent companies which themselves continue to exist. The making or promotion of the combination may be illustrated as follows.<sup>1</sup> Suppose there are fifty biscuit factories in operation in different parts of the country. The promoter organizes a corporation, probably in New Jersey, for the purpose of taking over these fifty factories. He then secures upon the various plants an option to purchase them either for cash or for stock of the new corporation. Some may be willing to sell out for stock, some may insist upon cash. When cash is required, the promoter makes a trade with some banker or financiering syndicate, by which the banker agrees to furnish the cash for the purchase of some of the plants, and in return he is to receive stock of the new corporation. The promoter is given the entire stock of the new corporation to buy the plants and to pay expenses, retaining the balance for himself. Suppose, then, he is given \$100,000,000 of preferred stock and \$100,000,000 of common stock. Thirty-five of the plants he desires are willing to take stock, and for this purpose he uses \$75,000,000 of the preferred stock and \$50,000,000 of the common. The other fifteen refuse to sell except for cash. The promoter makes his trade with the banker, who furnishes him \$24,000,000 in cash in return for \$24,000,000 of the preferred and \$24,000,000 of the common stock. The lawyers' fees, advertising, and incidental expenses amount to \$1,000,000, which the banker advances in return for \$1,000,000 preferred and \$1,000,000 common stock.<sup>2</sup> These various agreements are made at different times,

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"Q. Do I gather from your remarks that you think it is a pretty good idea for all competitors to be knocked out but the one that controls the business?

"A. That is trade, and you cannot alter it, and the Federal Government cannot alter it, and the sooner you realize it and stop the talk about it the better off the country will be in that respect." Report of Industrial Commission, i. 116.

<sup>1</sup> The American Chicle Co. (chewing-gum trust) was formed in this way. Testimony of C. R. Flint before the Industrial Commission. Ibid. xiii. 51.

<sup>2</sup> Usually the promoter is required to furnish also a certain amount of cash as working capital for the new corporation.



but frequently the whole matter is brought to a culmination at one and the same time and place. Supposing the preferred stock to be worth par, the banker has profited to the extent of \$25,000,000 in common stock; the promoter also has pocketed \$25,000,000 of common stock by the transaction. Not infrequently the promoter and banker are the same individual. This illustrates one method, but a fairly typical one, by which combinations are made. Sometimes only so much stock is issued as is needed to purchase the desired plants, and the promoter is given an amount of stock equal to five per cent of the issue.<sup>1</sup> Nearly all the methods employed, however, involve a large profit to the promoter and the financier.<sup>2</sup> This indicates a further reason, not hitherto considered, why combinations are made, namely, the opportunity afforded to the promoter and the financier to make great profits. Unquestionably many combinations have been instigated chiefly to accomplish this end.

The illustration of the method by which combinations are formed suggests what might be called another reason why combinations are made, but which may be better described as a usual incident to their formation. The promoter, we find, buys the various plants for cash or for stock in the new corporation. How much does he pay for them? If competition has been causing the various plants to run at a loss, the prospect of avoiding this competition held out by the proposed combination is certainly alluring to the owners of the various plants. Even here, however, there is a perhaps unreasoned fear that the proposed benefits may not materialize, and a disinclination to merge individual identity. There is the desire to sell out at the highest possible price. When the combination is of several successful companies, there is naturally a determination to secure a large profit by the sale. The acquisition of at least the important companies is necessary to the scheme of combination. The result is that the owners of the various plants receive a very high price if they sell for cash; a large bonus of stock if they sell for stock. It must be recognized that the constituent companies are often of much greater intrinsic value than is represented by the amount of money it would take to duplicate their plants. The fact that a business is going and established — its good-will, to use a loose but descriptive term — is often a more valuable commercial

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<sup>1</sup> This was the method in the case of the United States Rubber Company. Report of Industrial Commission, xiii. 8.

<sup>2</sup> Ibid. i. 15.



asset than its whole tangible property. Even so, the price in cash or stock at which the constituent company sells out to the trust is generally largely in excess of the value of the constituent company, even reckoned on the basis of its earning capacity.<sup>1</sup>

The initial cost of the combination over and above the sum of the values of its constituent parts must be a considerable amount. It is made up as follows: the excess, above value based on earning capacity, paid owners of the companies merged, plus the banker's profits, plus the promoter's profits, plus lawyers' fees, advertising, and incidental expenses. This can mean only one thing. Judged by the capitalization of the constituent companies, even when that is based on earning capacity, the combination is largely overcapitalized. Its securities at par on their face stand for a much greater value than the value of the constituent companies as such.<sup>2</sup> Whether the face value of the securities of the combination represents more than the value of the assets of constituent companies plus the fact that these assets are held and managed by the combination, — whether, in other words, the combination judged by its own earning capacity is overcapitalized, — is a different question. We have found that there is true value, a commercial asset, in the fact of combination. Further, we have separated this value into the following parts: (1) Economic benefits of combination; (2) Saving the wastes of competition; (3) Monopoly control. The value of all or perhaps any one of these as a basis for capitalization may exceed the excessive initial cost of forming the combination. If it does, the combination, judged by its own earning capacity and only from its own point of view, is not overcapitalized.

The combination must be scrutinized, however, from other points of view than its own. The character of a combination, that is, the values which make up the basis of its organization, is determined by the reasons which led to its formation. In actual fact all these reasons in greater or less degree unite to cause the formation of combinations. All combinations are complex in character. We cannot say that one is founded entirely on the economic benefits of combination, another entirely on the saving of the wastes of competition, a third wholly on monopoly control. Such hard

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<sup>1</sup> Report of Industrial Commission, i. 14.

<sup>2</sup> The total securities of the United States Steel Corporation are more than the total securities of its constituent companies by over four hundred and fifty million dollars.

and fast lines cannot be drawn around real combinations. For purposes of discussion, however, we may separate this complex character into distinct divisions. Further, let us assume that capitalization is a true standard of measurement. Suppose there are one hundred steel companies in active operation in the United States. (1) Fifty of these companies combine in a large corporation, capitalized for \$100,000,000. Of this \$60,000,000 represents the value of the constituent companies based on the earning capacity, and \$40,000,000 the value of the economic benefits of combination. This corporation will be able to pay fair dividends on its capitalization without either raising the selling price of its products or reducing the wages of its laborers. It can do this because it is founded on real value, namely, the economic benefits of combination. (2) Suppose, instead of fifty, seventy-five of these steel companies combine in a large corporation capitalized for \$220,000,000. Of this \$120,000,000 represents the value of the constituent companies based on earning capacity; \$80,000,000 the value of the economic benefits of combination, and \$20,000,000 the saving of the wastes of competition. So long as the wastes of competition are saved, this corporation will be able to pay fair dividends on its capitalization without either raising the selling price of its products or reducing the wages of its laborers. It can do this because it is founded on true value, namely, the economic benefits of combination plus the saving of the wastes of competition. (3) Suppose, instead of fifty or seventy-five, ninety-five of these steel companies combine in a large corporation capitalized for \$440,000,000. Of this \$160,000,000 represents the value of the constituent companies based on earning capacity; \$120,000,000 the value of the economic benefits of combination; \$60,000,000 the saving of the wastes of competition; \$100,000,000 monopoly control. To pay dividends on the \$100,000,000 representing monopoly control, this combination must lower wages or raise prices. It must do this because this part of its capital is founded not on true value, but on the fact that the combination is a practical monopoly.

In the difference between the first two combinations and the last, in the opinion of the writer, lies the trust problem. Let us assume in each example suggested that the combination embraces all the corporations engaged in a particular industry; that each combination controls the entire business of the country in this industry; that the only difference lies in the basis on which each is founded.

Competition has been entirely cut off in each case. Potential competition — that is, competition which will come into existence when alien capital sees opportunity for profitable investment — remains. When will this competition in fact arise? In other words, when will capital see opportunity for profitable investment? In the case of the first two combinations, never. The first two combinations are making a fair return on actual values which they possess. New capital will have neither the economic benefits of combination nor the saving of the wastes of competition. It cannot with a fair return to itself furnish products to the public at a lower price than that fixed by these two combinations; in other words, it cannot compete. In the case of the third combination, at once. This combination makes a profit not because of a true economic value, but simply because it may do as it pleases. This fact is an invitation to new capital sure to be accepted. The new competition will not require a return on \$100,000,000 of wholly fictitious value; in other words, it can compete. This fact renders the situation of the third combination constantly precarious and sometimes desperate. When the new competition is started, the combination is no longer a practical monopoly. It has lost that part of its value which we have called monopoly control, represented by \$100,000,000. Founded and maintained on the basis of monopoly control, it must prevent all competition or become a financial wreck. In fighting competition this combination fights for its very life; there is no choice about the matter; it must oppose competition at all hazards, must, if possible, crush it out as soon as it shows its head.

In the opinion of the writer, public interest does not require that competition should arise in the case of a combination founded and maintained on the economic benefits of combination and the saving of the wastes of competition. This combination has not raised prices, has not lowered wages. No one is poorer or in a less favorable position because of its existence. The worst that can be said is that every one is not better off. New values created from an idea have come into existence and certain persons have profited by them; in the case imagined, it is the promoter, the banker, and the owners of the constituent plants. If labor has so organized that it can successfully demand a share in these new values, it too has profited. The consumer has not. This, however, is dealing theoretically with the question to the last degree.

In actual fact, a combination of all the corporations engaged in a particular industry never takes place. In the example first given, for instance, where fifty corporations combined, the other fifty or some part of them may combine, securing also the economic benefits of combination. One or the other of these combinations, instead of paying immense profits to promoters and financiers, and so being obliged fully to capitalize the new value lying in the fact of combination, may permit this value, in part at least, to result in a lower selling price to the consumer. The combination doing this can and will undersell the one that does not. It will therefore secure the majority of trade and tend to secure the entire trade. Thus, in fact, the economic benefits of combination and the saving of the wastes of competition which come into existence through this idea of consolidation tend logically to result in a lower price to the consumer. He, too, will share in the new values. This is the ideal condition which all combinations should reach. If potential competition were efficient, the real condition would approach closely to the ideal. Unquestionably, however, potential competition is not efficient in actual practice. Stated in a broad way, the solution of the trust problem lies in making potential competition as effective in fact as it is in theory. What is needed to accomplish this?

First, alien capital must know all the facts, must see the organization, operations, and profits of the combination with the same distinctness with which it has been assumed to see them in the illustrations of this paper. Nothing in the nature of things makes this impossible or even difficult.

Second, means must be devised to counteract the fact that in the nature of things potential competition cannot instantaneously become actual competition. It must be recognized that even with abundant capital one cannot erect a steel manufacturing plant or a sugar refinery until considerable time has elapsed. It must also be recognized that this delay, besides involving possible changes in the conditions of trade, affords precisely the opportunity to those in control of the practical monopoly to yield to that instinct pretty generally rooted in imperfect human nature, — to make a lot of money now, and be good ever after. Further, strikes and other incidents for which those in control of the practical monopoly may not be directly responsible are likely to work public discomfort. To indicate methods for reaching results is not within the scope of this mere statement of the trust problem. Govern-

ment inspection and supervision, as covering the point under consideration, is suggested only by way of example.

Third, the combination must fight the new competition only by proper methods. This is not the case at present. Cut-throat competition flourishes;<sup>1</sup> it is said that freight and other discriminations still exist; the writer hazards the opinion that things are done by the combination for which its directors as individual citizens would hesitate to assume the responsibility.

If effort to improve existing conditions is concentrated on these three points, the writer believes the trust problem would assume a more definite aspect.

In this statement of the problem it seems proper to the writer briefly to indicate why the public may with perfect propriety take a hand in its solution. The existence of a combination founded and maintained on the basis of monopoly control does affect the public, — the consumer, because it raises prices;<sup>2</sup> the laborer, because it lowers wages, and because the laborer skilled in only one employment has nowhere else to turn. Whether it is the public's business to take a hand in the matter depends upon something further. Our laws are founded on the principle that there should be as wide freedom for the individual as is compatible with the safety and welfare of the whole community. Until recently, facts measured by this principle have justified the theory that the method of conducting one's business, provided it be legal, is

<sup>1</sup> Testimony of Archibald S. White, President of the National Salt Company.

"Q. That is, where there is competition you sell low, and you recoup yourself off the general market?

"A. Certainly. And if we find it necessary we sell salt at less than cost.

"Q. Is that fair to the competitor, do you think?

"A. We are not looking out for his interests." Report of Industrial Commission, xiii. 262.

Testimony of H. O. Havemeyer.

"Q. Now, as regards this later drop in the margin, that was caused by what competition particularly?

"A. That is the new interlopers, the new refineries. What do you call them, these different refineries? There were half a dozen of them who began active operations, and threatened, if we left them to themselves, to displace our meltings to the extent of 50 per cent.

"Q. Your policy was, substantially, to put the price down so they would not find it profitable to remain in business?

"A. And to secure the continuation of the output of the American Sugar Refinery, which is very vital to it." Ibid. i. 108.

<sup>2</sup> Prices may be lowered in fact and at the same time raised in principle. Improved machinery, a wider market, and other conditions not springing from combination are excluded from consideration in this paper, but are of great practical importance.

one's own private affair; that it is none of the public's business. If by force of the existing movement towards consolidation the business of men or corporations may become so combined as to result in a practical monopoly, something which does affect the public, the facts have outgrown the theory. A change in degree, as is not unusual, effects a change in substance.

Regarded more narrowly, the right of the public to take a hand appears to be obvious; an exercise of the right would seem to be neither revolutionary nor radical. To what do trusts owe their existence? Practically all of them are now corporations. They have not been able to maintain a successful existence in any other form. Further, even in the case of the real trust and the pool, the constituent parts of the combination were themselves corporations and were so of necessity. The recognized advantages of the corporate form of doing business are principally three:<sup>1</sup> (1) Many persons are able to act as a single legal entity. (2) The liability of the owners of the business, that is, the stockholders, is limited in amount. (3) The legal entity has continuous existence. Less obvious advantages, but flowing from these, are (1) the ability to raise a large capital because of the fact that the investor's liability is limited, and because of the convenience with which evidence of ownership, that is, stock certificates, may be issued and subsequently transferred; (2) and efficient management, because, while many contribute to the financial strength of the enterprise, the actual management is left in the hands of the few, — presumably the few most capable, namely, the directors. The only known way in which these advantages can be secured is through the corporation. Without these advantages it is impossible for the trust to exist.

Where does the corporation come from? Is it, like life, liberty, and the pursuit of happiness, something to which men are born and to which they have an inalienable right? Corporations in this country exist only by permission of the legislatures of the

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<sup>1</sup> "The great distinctive feature of a corporation is, that it is authorized by a law or grant to act as an artificial being, the several members of which constitute one person in law, and have but a single will." Hand, Senator, in *Gifford v. Livingston*, 2 Davis (N. Y.) 395.

"The corporation is a protection in that the liability is limited; it is capable in that it renders possible the collection of a great capital; it is efficient because the directors, and they alone, govern its policy and its contracts; and it is convenient because it is easy to sell or buy or pledge or bequeath one's interest in the concern." Cook on the Law of Corporations, p. 3.

various states, — by sanction of the public, acting through its chosen representatives.<sup>1</sup> This fact seems sometimes to be imperfectly recognized.<sup>2</sup> Permission of the sovereignty is the absolutely essential requirement to bring a corporation into being; and this has always been true from the very earliest times. There is not and never has been a business corporation at common law.<sup>3</sup> Further than this, the first corporations were formed for the purpose of carrying on some enterprise directly for the public. The learned author of "The History of the Law of Business Corporation before 1800" has said in these columns, in speaking of English corporations in the year 1692: "But the corporation was far from being regarded as simply an organization for the mere convenient prosecution of business. It was looked on as a public agency."<sup>4</sup>

The public created corporations for its own good; for its own good it may limit their functions or regulate their powers. The public must act by legislation. Because there is true economic value in the movement which has resulted in trusts, this legislation should not go beyond the point of making potential competition efficient.

*Robert L. Raymond.*

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<sup>1</sup> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality, — properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual." Marshall, C. J., in *Dartmouth College v. Woodward*, 4 Wheat. 636.

<sup>2</sup> Testimony of H. O. Havemeyer before the Industrial Commission. "It is my opinion that corporations are under no obligations whatever to any of the States for their existence. Quite the reverse. The States are under obligations to them." Report of Industrial Commission, i. 103.

<sup>3</sup> Williston on History of Law of Business Corporations before 1800. 2 HARV. L. REV. 112.

<sup>4</sup> 2 HARV. L. REV. 110.



## A PROBLEM IN MINING LAW: WALRATH v. CHAMPION MINING COMPANY.

THE case<sup>1</sup> which is the subject of this paper fixes the property rights of a locator who has the apex of more than one vein within the lines of his claim. The precise question had not been presented for decision before this controversy arose. The problem attempted to be solved by the decision is one of the most perplexing questions that have arisen under the mining code. The decision briefly stated holds, first, that where two or more veins apex in a claim, the court must decide which vein is the principal vein, and fix the end lines of the claim by reference to that principal vein; second, that those end lines as defined by the principal vein are the end lines for all other veins apexing in the claim; and, third, that the locator owns all the veins having any part of their apexes in his claim, from the apexes downward throughout the entire depth of the veins, within the vertical planes drawn through the ascertained end lines of the claim extended in their own direction.

If this decision announces a proposition of law that is to be adhered to, it has unsettled certain doctrines of mining law which have heretofore been accepted without question. It is the aim of this article to attempt to point out what the opinion has really decided, and then to examine whether the results attained are reconcilable with principles heretofore received as almost axiomatic.

A prospector making a discovery of a metalliferous vein upon the unappropriated mineral lands of the United States has the right to locate a mining claim upon his discovery. It was believed among all classes engaged in mining, as well as among mining lawyers, that the locator by making a proper location upon his discovery acquired the right to mine his vein from its apex downward, so long as he confined his workings within vertical planes drawn downward through what the law defined to be the end lines of his claim, provided he did not obtrude within the planes of the end lines of some older location which owned that particular

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<sup>1</sup> Walrath v. Champion M. Co., 171 U. S. 293.

portion of the vein by reason of its ownership of the apex. But this common belief has been shown to be not justified under a peculiar state of facts by this decision of the Supreme Court of the United States, the ultimate authority upon such questions. The opinion was delivered May 31, 1898, and it was concurred in by a unanimous court. It advanced propositions which at first blush seem a radical departure, in that a mining claim was given a portion of a vein the apex of which portion was not covered by the claim but was clearly outside the claim.

The statute of the United States<sup>1</sup> which governs the rights of claimants of veins, as distinguished from placers, gives to

"the locators of all mining locations heretofore made or which may hereafter be made . . . so long as they comply with laws of the United States, and with state, territorial, and local regulations not in conflict with laws of the United States, . . . the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior part of such veins or ledges."

All mineral patents of the United States grant this right to follow the vein outside the side lines within the end line planes, and all mining lands granted by patent are subject to this right of extra-lateral pursuit of the owners of adjoining locations.<sup>2</sup>

Before passing to the case under examination, it may not be amiss to define a few common terms of mining law, so far as a definition is needed for this discussion. All veins or lodes are conceived to be more or less tabular in form, or as sheets of mineral-bearing substance of varying thickness found in the earth's crust. The apex of a vein means that terminal edge of the vein which approaches nearest to the surface of "rock in place," *i. e.*, the unbroken mass of the earth as distinguished from surface wash,

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<sup>1</sup> Rev. Stat. sec. 2322.

<sup>2</sup> A mineral patent is read just as if the statute were written in it, whatever the terms of the patent may be. *Walrath v. Champion M. Co.*, 171 U. S. 305.

or float, or the material of detrition. The strike, or onward course of a vein, is its longitudinal direction across the country. If the vein outcrops on the surface, this strike is shown by the course the vein takes on the surface. But the true strike of a vein is a horizontal line, the line of a level run in the vein and lengthwise the vein.<sup>1</sup> The dip of a vein is its extension in depth, the "course downward" and "depth" of the statute, and is, for any particular place on the vein, the steepest inclination downward of the vein into the earth. The dip is spoken of as easterly or westerly or some other compass direction, or as being of so many degrees, which means so many degrees from the horizontal. Thus, a vein going into the earth toward the east at an angle of sixty-five degrees from the horizontal is said to dip easterly sixty-five degrees. Mathematically, the dip must be at a right angle to the true strike. The term "extra-lateral" refers to the right given by statute to pursue a vein outside the segment of the earth defined by the surface lines of the claim.

The following diagram, taken from the reports of the case,<sup>2</sup> shows the situation of the contesting claims, the portions of the vein in dispute, the end lines claimed by the respective parties, the courses of the veins, and the lines as fixed by the three courts which in turn passed upon the case. Careful reference is required to be made to this diagram in order to comprehend the points involved.

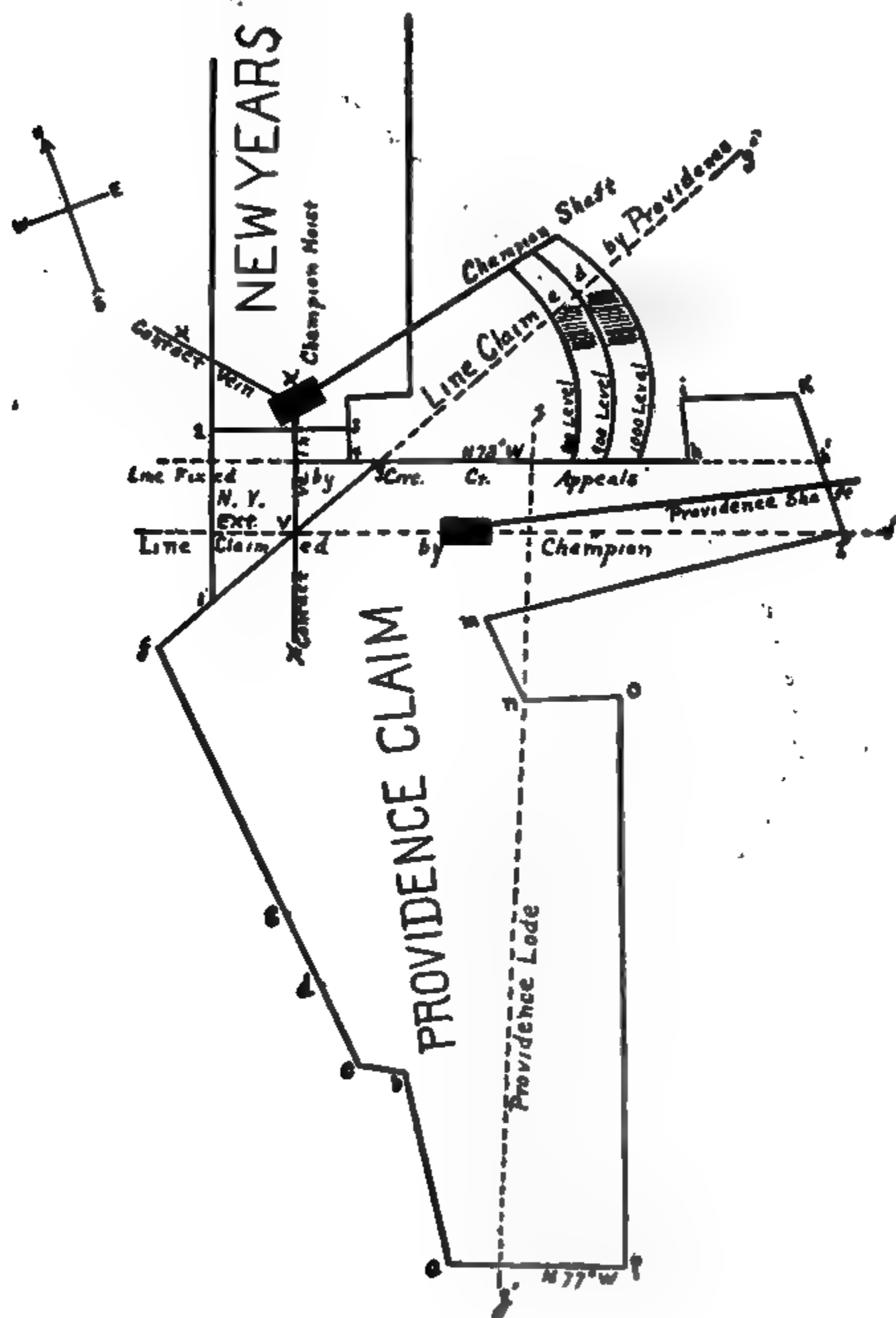
Walrath, the complainant, as owner of the Providence, brought suit in the Court below against the Champion Company, as the owner of the New Year's and New Year's Extension. The relief sought was the establishment of the rights of the Providence claim in the vein called the Contact, and an accounting for ores extracted from that vein by the Champion Company.

There were two veins in the Providence, both dipping easterly, — one a fissure vein in granite called the Providence lode; the other a vein on the contact of the slate and granite formations, called the Contact, or Back vein. The Providence was the oldest loca-

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<sup>1</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463. This horizontal line may be straight or broken or curved. It varies in direction with the lengthwise direction of the vein.

<sup>2</sup> In the Circuit Court, 63 Fed. Rep. 552. The diagram in this case shows the levels of the Champion and the courses of the end lines of the Providence, and is fuller than the plat, in the Supreme Court report. In the Circuit Court of Appeals, 72 Fed. Rep. 978. The diagram here given is the same as that given in the Court below. In the Supreme Court, 171 U. S. 293. Two diagrams are found in this report.



tion. It was located in 1857 before there was any mining statute, when the customs of miners were controlling and were recognized by the courts.<sup>1</sup> The claim was patented under the law of 1866, which was the first mining statute.<sup>2</sup> Under this patent the Providence obtained but the one lode, the Providence lode, which is the vein indicated by the line  $ss'$ .<sup>3</sup> The end lines of the Providence,  $gh$  and  $ap$ , which are the lines crossed by the Providence lode, are not parallel; one line runs north seventy-seven degrees west, the other north seventy-three degrees west. By the act of 1866, parallelism of end lines was not necessary to extra-lateral rights,<sup>4</sup> but such parallelism is required by the statute of 1872,<sup>5</sup> before extra-lateral rights accrue.<sup>6</sup> But under the act of 1872 the owner of the Providence gained rights in the Contact vein, for the section quoted from the statute gave to him all other veins, the top or apex of which lay within the patented area.

The New Year's Extension, outlined by 1, 2, 3, 4,  $g$ , was located under the act of 1872, which required parallel end lines as a prerequisite to extra-lateral rights,<sup>7</sup> but whether that claim was entitled to extra-lateral rights was immaterial.

The diagram indicates the ore bodies more particularly in dispute as lying between the 800 and 1000 foot levels run southerly from the Champion shaft. They are shown in the triangle formed by the line claimed by the Providence and the line claimed by the Champion. These ore bodies are outside the lines of both the plaintiff's and the defendant's ground. The pleadings also put in issue the ownership of the Contact vein at its apex in the New Year's Extension.

A fact most important to note is that the action was brought by Walrath as the owner of the Providence. His sole claim was based upon his ownership of that claim, and he was relying upon

<sup>1</sup> *Sparrow v. Strong*, 3 Wall. 97; *Jennison v. Kirk*, 98 U. S. 453; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 62.

<sup>2</sup> 14 Stat. 251.

<sup>3</sup> The statute provided that but one lode could be obtained by the patent. See 171 U. S. 305.

<sup>4</sup> *Eureka M. Co. v. Richmond M. Co.*, 4 Sawy. 302; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478; *Carson City M. Co. v. North Star M. Co.*, 83 Fed. Rep. 658; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55.

<sup>5</sup> Rev. Stat. sec. 2320.

<sup>6</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463; *Argentine M. Co. v. Terrible M. Co.* 122 U. S. 478; *King v. Amy M. Co.*, 152 U. S. 222.

<sup>7</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463; *King v. Amy M. Co.*, 152 U. S. 222; and see all the cases cited in the last note but one.

his ownership of an apex, and upon the continuity of his vein from an apex in his Providence claim to the portion of the vein in dispute. The easterly portion of the vein where it was disputed, so far as ore is indicated, lay outside both defendant's and plaintiff's claims. Hence there was no question involved as to any common law presumption giving to the owner of the surface all vein beneath the surface, until an apex for that portion of the vein was shown outside the claim, whose lines include that portion of the vein.<sup>1</sup> It is apparent that for Walrath to recover he must show that the disputed portion of the vein lay within the vertical planes of the end lines, defining his extra-lateral rights on the Contact vein. It was conceded that the portion of vein in dispute was in the Contact vein, and there was no controversy as to the situation of the apex of that vein. It followed that unless Walrath could show the disputed portion of the vein to be within his end line planes, judgment must go for the defendant. This conclusion, however, would not affirm that the defendant owned the disputed portion of the vein, or that the subject of contention was covered by the extra-lateral rights of his New Year's Extension. The existence of extra-lateral rights upon the New Year's and New Year's Extension, and the extent thereof, were questions wholly immaterial to the issue. The sole question to be settled was the northerly end line plane of the Providence.

The Circuit Court announced the general principle that end lines of the claim must be the same for all veins apexing therein, but departed from its principle by projecting the northerly end line plane of the Providence vertically along the broken line *fg**h*, being the end line and a side line of the Providence.<sup>2</sup> In other words, that end line plane was not a plane, but two planes of varying directions. This decision gave all that portion of the Contact vein along the apex from the point *v* to the line *g**h* extended westerly in its own direction down to the vertical plane through the line *fg* to the New Year's Extension. This amount according to the scale was more than 100 feet of apex.

The Circuit Court of Appeals affirmed the general principle, but fixed the northerly end line plane of the Providence along the line *g**h* extended in its own direction both westerly and easterly.<sup>3</sup> It

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<sup>1</sup> For the effect of the common law presumption, see *Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 196; *Jones v. Prospect M. Co.*, 31 Pac. Rep. 642; *Consolidated M. Co. v. Champion M. Co.*, 63 Fed. Rep. 540, 550.

<sup>2</sup> *Walrath v. Champion M. Co.*, 63 Fed. Rep. 552, 558.

<sup>3</sup> *Walrath v. Champion M. Co.*, 72 Fed. Rep. 978.

gave that portion of the Contact vein along the apex from the point *v* to the line *g h* extended westerly in its own direction, to the Providence, and in consequence all that portion of the vein upon its dip went to the Providence.<sup>1</sup> That portion of the apex just described lies outside the surface lines of the Providence. The Supreme Court concurred in the general principle and affirmed the ruling of the Circuit Court of Appeals.<sup>2</sup> But since Walrath alone appealed the Supreme Court had no jurisdiction to reverse the decision as to the portion of the vein last mentioned.

Prior to these decisions, the only ruling upon this question was a *dictum* of Judge Field in *Iron Silver M. Co. v. Elgin M. Co.*<sup>3</sup> And when the *dictum* is closely examined it simply says that the rights of the locator for all veins in his location cannot go beyond the planes of his end lines. It does not affirm, what Judge Hawley thought it did,<sup>4</sup> namely, that the right of the locator upon every vein in his claim extended up to the end lines.

It will be useful to consider the law of apex as adjudicated in various other decisions in regard to single veins in a claim. Under the laws of 1866 and 1872, the locator obtains no extra-lateral or other rights upon any portion of the vein, whose apex is outside the surface lines of his claim.<sup>5</sup> It was never before suggested that there could possibly be a case contrary to this rule. If the apex crossed both end lines and between those lines was, for any part

<sup>1</sup> By a reference to the line claimed by the Providence, as shown in the diagram, it will be seen that the Providence made no claim to that portion of the apex.

<sup>2</sup> *Walrath v. Champion M. Co.*, 171 U. S. 293, 312.

<sup>3</sup> 118 U. S. 196, 209. It is apparent that the Justice was combating the doctrine contended for in the dissenting opinion of Chief Justice Waite and Justice Bradley, to the effect that the end lines of a mining location, regardless of the end lines marked by the locator, are to be fixed by the court by projecting parallel end lines crosswise the general course of the vein at the extreme points where the apex leaves the location as marked on the surface. However easy of application such a rule would be to a vein having a substantially straight onward course, it was a practical impossibility as applied to the vein in that particular case, for the course of the apex described a "horse-shoe." See 118 U. S. 203, for the diagram. It may be conceded that Judge Field amply demonstrated the weakness of the view of his dissenting brethren, but in the eagerness of argument he enunciated a general principle as controlling a most difficult question which was not being argued before the court and which it was not necessary to decide, for there was no question in the case involving more than one vein in a single claim.

<sup>4</sup> See 63 Fed. Rep. 558, where the language of Judge Field is quoted.

<sup>5</sup> *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 91, decided at the same time as the case of *Walrath v. Champion*; and singularly enough the *Walrath* case reaffirms the other case.



of it,<sup>1</sup> continuously along its strike within the claim, the whole of the vein on its dip belonged to the claim within the end line planes. If, however, the apex departed over a side line and then returned to the claim, no extra-lateral or other right existed as to that part of the vein apexing wholly outside of the claim.<sup>2</sup>

The case just put is one of end lines fixed by the locator. But there are cases where one or both end lines must be projected by the courts according to the equity of the statute.

(a) If the apex crosses both side lines, those side lines become end lines,<sup>3</sup> but in a case where the apex crossing both side lines courses or strikes more with the length of the claim than across it, *i. e.*, if the angles made with the side lines are less than forty-five degrees, it is said that end lines parallel to the located end lines are to be drawn at the points where the apex departs from the side lines of the claim.<sup>4</sup> (b) If the apex crosses an end line and a side line, the end line crossed is one end line and the other end line is to be drawn parallel thereto at the extreme point of apex departure on the side line,<sup>5</sup> and this rule is applied to every such case.<sup>6</sup> (c) If the apex crosses an end line and is terminated in the claim, the crossed end line is one end line, and another end line parallel to it is drawn at the point of termination.<sup>7</sup> (d) If the apex crosses in and out of the claim on the same side line, end lines parallel to the located end lines are drawn at the points of final departure.<sup>8</sup> (e) If the apex crosses neither line of the claim, it is suggested that end lines be drawn parallel to the located end lines, giving the locator

<sup>1</sup> There are cases of an apex split along the strike of the vein by a side line. In such cases the older location takes the whole vein. *Bullion M. Co. v. Eureka M. Co.*, 5 Utah, 3; *Empire State M. Co. v. Bunker Hill M. Co.*, 114 Fed. Rep. 417; 106 Fed. Rep. 471; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478 (*dictum*).

<sup>2</sup> *Waterloo M. Co. v. Doe*, 82 Fed. Rep. 45.

<sup>3</sup> *Flagstaff M. Co. v. Tarbet*, 98 U. S. 463; *King v. Amy M. Co.*, 152 U. S. 222; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55. The second case cited in this note is opposed to the cases cited in the next note.

<sup>4</sup> *Last Chance M. Co. v. Tyler M. Co.*, 61 Fed. Rep. 559; *Consolidated M. Co. v. Champion M. Co.*, 63 Fed. Rep. 540. See the language of Brewer, J., 171 U. S. 90, 91, confirming this point.

<sup>5</sup> *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 91, citing several decisions.

<sup>6</sup> Brewer, J., 171 U. S. 89.

<sup>7</sup> *Carson City M. Co. v. North Star M. Co.*, 73 Fed. Rep. 597, affirmed 83 Fed. Rep. 658.

<sup>8</sup> *St. Louis M. Co. v. Montana M. Co.*, 104 Fed. Rep. 664, citing the former decision in the same case, 102 Fed. Rep. 430. *Catron v. Old*, 23 Colo. 441, *contra*, no longer authority.

as much length of vein on the dip as he has length of apex within his claim.<sup>1</sup>

The case not noted is that of a vein crossing in over a side line and terminating before reaching any other line of the claim. But the spirit of the decisions would probably require the crossed side line to be one end line, and another end line parallel thereto to be drawn at the point of termination within the claim, unless the course of the vein in the claim was more with than across it.

It appears therefore from all the decisions that the law is conceived to require, except in one very peculiar case, that a locator should be given the same length of vein on dip as he has length of apex; but every one of these decisions is based upon the idea that the locator should not be given any part of a vein whose apex is outside his surface lines.

If, then, we suppose that the Contact vein were the only vein in the Providence, the solution of the case required, first, the designation of the end lines of the Providence. Clearly, as the courts held, they were the lines *gh* and *ap*, because they were the two extreme lines defining the ends of the claim, which were crossed by a vein or veins. The end lines being settled, the second question that arose was as to whether the Providence had extra-lateral rights. The court so assumed, and so far as the reports show, the point seems to have been conceded by the defendant.<sup>2</sup> But the Providence patent and original location gave rights only in the Providence lode. The Contact vein was granted to it solely by the law of 1872. But as a prerequisite to acquiring extra-lateral rights under that law, the claim must have parallel end lines. Since the end lines of the Providence were not parallel, it perhaps would follow that the claim gained no extra-lateral rights on the Contact vein. But the two end lines are substantially parallel, for they differ in direction only four degrees, and this objection may be considered obviated. The Circuit Court of Appeals expressly held the Providence to be entitled to follow the Contact vein extra-laterally.

If the Providence is entitled to extra-lateral rights on the Contact vein, the decision may be considered as an authority for the

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<sup>1</sup> *Tyler M. Co. v. Sweeney*, 54 Fed. Rep. 292 (*dictum*); *Del Monte M. Co. v. New York M. Co.*, 66 Fed. Rep. 212 (*dictum*); *Tyler M. Co. v. Last Chance M. Co.*, 71 Fed. Rep. 848 (*dictum*); *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 89 (*dictum*).

<sup>2</sup> Mr. Curtis H. Lindley, counsel for the Champion, so conceded. 2 Lindley on Mines, 743.

proposition that if the claim is entitled to extra-lateral rights on the principal vein, it is so entitled upon all the veins in it. Or we may look at the decision in another way. The Contact vein is developed for merely a short distance in the Providence. It may be presumed to cross out over the same side it entered upon. If so, this case affirms the decision of the Circuit Court of Appeals in the cases cited as to such an apex. Or the apex may be presumed to terminate in the claim. If that be so, this case affirms the decision of the Circuit Court of Appeals in the cases cited as to that form of apex occurrence.

Conceding, then, the extra-lateral rights of the Providence on the Contact vein, if it were considered as the only vein in the claim, the decisions would require that through the point *v* an end line plane should be projected parallel to the end line *g h*. This is the line claimed by the Champion, and the defendant was entitled to judgment, since plaintiff's rights on the dip did not reach any portion of the vein for which suit was brought.

The courts, however, rejected this theory of the law, because there were two veins in the Providence. It may be conceded that, under the peculiar facts of this case, it was possible for the court to say that one vein was principal and the other subsidiary. But it was wholly an accidental circumstance that the claim had been patented upon the Providence lode under the law of 1866, and had afterwards been granted the Contact vein by the law of 1872.

The latter law places all veins in a claim on the same level. There is no principal and no subsidiary vein. Since one lode and only one could be patented under the law of 1866, and since that lode was required to be named in the patent, the diagram annexed to the patent contained a lode line designating the course of the lode named in the patent. It is true that the draughtsmen of the Land Office, after the law of 1872, forgetting that the latter law patented a surface and all lodes therein, continued to indicate a lode line in the patent. But the lode line meant nothing. The patent conclusively proved a vein to be in the ground, but the lode line did not prove that there was any particular lode in the patented area at any particular place, or that the lode indicated by the lode line was at that place.<sup>1</sup> It is believed that the patents now being issued do not contain any lode line.

Hence it is that any attempt to fix a principal vein in regard to locations under the law of 1872 is so illusory. The difficulties that

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<sup>1</sup> Consolidated M. Co. v. Champion M. Co., 63 Fed. Rep. 540, 551.

would arise in the latter case, where there were two or more veins in a claim, must be extraordinary. Suppose a vein to be discovered and a location made upon that discovery in such a way that the apex crosses an end line and a side line midway the claim. If the claim is 1500 feet long, the locator has but 750 feet of apex, and his end lines would be made that far apart. But suppose that later another vein is discovered crossing both end lines of his location and coursing within his claim for the whole length of it. On this latter vein he is entitled to 1500 feet of vein. Who is to say which is the principal and which the subsidiary vein? Is priority of discovery to be the criterion? If so, the locator would lose on the second vein 750 feet of vein, which the law expressly gives him, if this Walrath case announces a correct principle. The obstacles to a search for a principal and a subsidiary vein under the law of 1872 seem to be insuperable.

The second proposition advanced by the court, to wit, that the end line planes for every vein in the claim must be the same, is no less untenable. Assume that the Providence claim is located and patented, and the New Year's Extension non-existent. A locator coming upon the ground would find a wholly unoccupied apex from the point *v* to the line *g h*, extended in its own direction westerly. The express words of the statute permit him to locate it. This case affirms that the locator would get nothing, because that portion of the vein belongs to the Providence.

Again, assume that the Contact vein passes out of the Providence at *v* and turns westerly upon its strike, dipping southerly. It is apparent that the plane of the line fixed by the Circuit Court of Appeals will never cut the Contact vein. Yet this decision says that all of that vein, southerly of the line fixed by the Circuit Court of Appeals, so far as the vein is developed, belongs to the Providence. If that is true, in the case last supposed, the Providence would own the Contact vein westerly of the point *v* until the vein ceased upon its strike. Is it conceivable that in such a case the court would have rendered this decision or affirmed its general principle?

Suppose a second case. It is wholly possible that the Contact vein might go out of the Providence across the line *c d*, and then extend northerly for a long distance, practically parallel to the west side of the Providence, but outside the Providence. The result of the decision would be that all of the Contact vein outside the Providence until the point was reached, where that vein was

cut by the line fixed by the Circuit Court of Appeals, would belong to the Providence. That distance would be over 1500 feet, and the astonishing result of this case is that that 1500 feet of apex and vein would belong to a claim which did not cover that length of apex in any way; for if the decision is correct when applied to 50 or 100 feet of apex, it must be none the less correct when applied to 1500 feet of apex.

Let us test the decision by a third case. It is a possible, though not a usual, thing for a vein to go into the earth vertically. Imagine the Contact vein from the point *v*, where it leaves the Providence, to the point where it is cut by the line fixed by the Circuit Court of Appeals, — and that is the portion of the vein that is expressly declared to belong to the Providence, — imagine that portion of the vein to be vertical. On its course downward that portion of the vein would always be under the New Year's Extension, and that portion necessarily both in length and in depth would be within the surface lines of the New Year's Extension. No mining engineer, however elastic his conscience, would dare to say that the apex of that length of the vein was not in the New Year's Extension. The law expressly says that if that be the case, such portion of the vein belongs to that claim. Yet this decision holds that it belongs to the Providence. If the Contact vein had been a vertical vein, it is inconceivable that the court would have decided the case as it did.

The decision is all the more strange when one recalls the words of another case in this same volume of reports. The court there say: <sup>1</sup> " Upon the fact that an apex is within his surface lines, all his [the locator's] underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth." But the Walrath decision gravely propounds a case where the locator has an apex within his surface through his entire location, and has the undisputed and conceded right to that surface, and yet does not own that very portion of apex which he has covered.

We may put another case. Assume that the apex of the Contact vein entered the Providence across the line *ef*, and then proceeded easterly cutting the lode line, and crossed out of the claim over the line *op*. There are decisions of courts based upon an express statute which say that such a vein cannot belong to the

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<sup>1</sup> 171 U. S. 91.

Providence beyond the planes of the lines *ef* and *op*.<sup>1</sup> Whether those side lines are end line planes for such a cross vein, so as to give extra-lateral rights upon the cross vein, is a very different question, but its solution is not germane to this discussion. Suppose, however, that the crossing vein does not cut a vein running a part of the length of the claim. In such a case of crossing, it is absolutely certain that the principle of the case we are discussing cannot apply.

But one other hypothetical case needs to be suggested. Conceive that the Contact vein entered the Providence where it is shown to enter, and then proceeded until it joined the Providence lode, and thence southerly the two veins were identical. Such a situation would present an instance of a vein forking or splitting upon its strike. North of the point of junction the two veins are wholly separate and distinct; one vein in the case supposed would depart from the Providence at *s*, the other at *v*. This very case was presented to the Circuit Court of Appeals of the Eighth Circuit, and a unanimous court, after full consideration, held that in such a case each fork would have its own end line.<sup>2</sup> It shows that for the one vein there is one end line and for the other vein a totally different end line, and it never occurred to the eminent mining counsel engaged in that case to contend that a claim could own an apex wholly outside the claim.

From these hypothetical cases it appears that not only is this Walrath case impossible of application, but that it is contrary to the terms of the statute. Judge Hawley, who decided the case in the Circuit Court, is a judicial officer of the widest experience and highest reputation in mining cases. He saw the impossibility of giving to the Providence a portion of a vein of which it had not the

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<sup>1</sup> Such a vein is a cross vein. One set of cases maintains that the cross vein from side line to side line of the older claim belongs to the older claim. Other cases say that merely the space of intersection of the two veins belongs to the older claim. *Hall v. Equator M. Co.*, 11 Fed. Cas. No. 5931, *dictum*; *Branagan v. Dulaney*, 8 Colo. 408; *Lee v. Stahl*, 9 Colo. 208; 13 Colo. 174; *Oscamp v. Crystal River M. Co.*, 58 Fed. Rep. 293, citing other Colorado cases. But for the present law of Colorado see *Calhoun M. Co. v. Ajax M. Co.*, 27 Colo. 1, 59 Pac. Rep. 607. Compare *Pardee v. Murray*, 4 Mont. 279. It is probable that the courts have mistaken the meaning of the statute. *Watervale M. Co. v. Leach*, 33 Pac. Rep. 418; *Wilhelm v. Silvester*, 101 Cal. 358. It was intended to apply to veins crossing or intersecting only on dip and not on strike, but it is now too late so to contend.

<sup>2</sup> *Colorado Central M. Co. v. Turck*, 50 Fed. Rep. 888, 898. This case leaves in doubt whether the side line crossed would become an end line or whether, at the point of crossing on the side line, an end line would be drawn parallel to the end lines



apex, but in deference to a *dictum* of Judge Field, he was driven to making the end line plane of the Providence a broken plane, thus increasing the length of vein given to that claim as the vein descended into the earth. The higher courts were appalled by the hopeless incongruity of such an end line, but their conclusion is no less indefensible.

It is probable, too, that the apparent injustice of the line claimed by the Champion weighed upon the courts. If that line had been affirmed by the decision, the Champion Company would have taken, perhaps, not only a portion of the Providence shaft, but also the greater part of its underground workings. In an attempt to avoid such a result, the courts made, it is suggested with deference, an erroneous ruling.

But is there any rule that is capable of application to all cases of plurality of veins in claims located under the act of 1872? It is believed that such a rule can be formulated. We may leave out of view cross veins which actually cross some other vein, for they are governed by another statute. It is apparent that if all the veins are crosswise the claim, no difficulty would arise. If one vein is lengthwise and the other crosswise the claim, the cross vein will always be a statutory cross vein, except in those peculiar cases where the crossing vein terminates before it reaches the vein running lengthwise, or the lengthwise vein terminates or passes out over a side line before it reaches the vein running across the location.

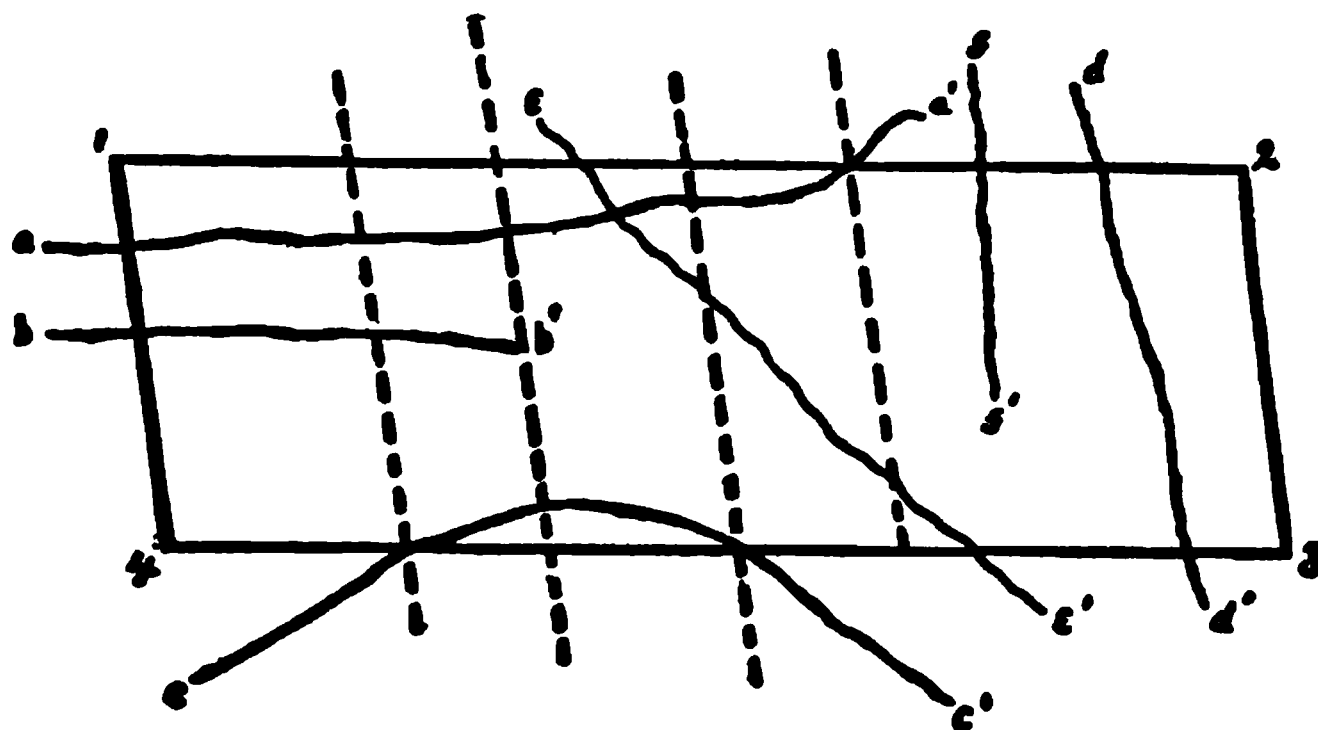
With such veins eliminated there would remain veins crossing both end lines, veins crossing an end line and a side line, veins crossing in and out on the same side line, veins crossing an end line and terminating in the claim, and veins crossing no line of the claim. The rule would be that no vein could have extra-lateral rights beyond the planes of the end lines as marked by the locator. For each particular vein fix the extra-lateral rights upon it according to the rules now laid down in the decisions. Every end line plane for any vein in the claim would necessarily be parallel to the end lines of the claim. If those end lines as fixed by the locator be not parallel, no extra-lateral rights would exist in regard to any vein. Such a rule would be reconcilable with the law as it has been settled by decisions. This Walrath case could be disposed of by saying that it is applicable solely to claims located and patented under the law of 1866.

The effect of the rule suggested may be better seen in the follow-



ing diagram, representing a number of possible occurrences, all in one claim.

Let the figure 1, 2, 3, 4 represent a mining claim, with one apex  $a a'$  crossing an end line and side line, another apex  $b b'$  crossing an end line and terminating in the claim, another apex  $c c'$  crossing in and out on a side line, another apex  $d d'$  crossing both side lines, but crossing no other vein, another apex  $e e'$ , an actual cross vein, and another apex  $f f'$ , a crossing vein cutting only one side line. The various broken lines drawn at the points of departure of the veins  $a a'$ ,  $b b'$ ,  $c c'$ , represent the planes governing the extra-lateral rights of the claim on the respective veins. The claim obtains no extra-lateral rights on any portion of apex which is not contained within the surface lines of the claim. The apex  $e e'$  is a



statutory cross vein, governed by the cross vein statute. It is impossible, however, to make any rule to govern the right of the claim on the veins  $d d'$ ,  $f f'$ . The decisions say that the side lines would be end lines, and if that rule is to be applied, it is not possible to draw planes for them parallel to the end lines, and such veins must be an exception to any rule.

If an attempt is made to apply to the above situation as outlined in the diagram the court's rule that the end line bounding planes for all veins in a claim must be the same, it is at once seen that the rule cannot be applied without giving the claim apexes that it does not cover. In such a situation the difficulty of identifying the principal vein seems equally hopeless.

The rule suggested above has singularly enough been followed by the same Circuit Court of Appeals, which decided the Walrath case, without even noticing the contrary rule, which it had estab-

lished. In *Montana M. Co. v. St. Louis M. Co.*<sup>1</sup> that court, with the same judges sitting, had before it a case where a claim, the St. Louis, had in it two veins. The one vein, called "Discovery," ran the full length of the claim crossing two parallel end lines.<sup>2</sup> The other vein, called "Drum Lummon," entered and passed out of the claim on a side line.<sup>3</sup> It is apparent that under the *Walrath* case the St. Louis claim took all the Drum Lummon vein for the full length of apex between the end line planes of the St. Louis claim. But the court held, in its second decision in the case,<sup>4</sup> that the extra-lateral rights of the St. Louis claim upon the latter vein were limited by end line planes drawn parallel to the end lines of the claim and through the points of extreme departure of the latter vein. Hence it held that the end line planes for the Drum Lummon vein were different from the end line planes for the other vein in the claim. It was not suggested to the court that it was violating the rule laid down in its former decision,<sup>5</sup> which had been affirmed by the Supreme Court.<sup>6</sup> The court does not seem to have recalled the principle of its former decision, but said that "the entire vein [Drum Lummon] must be considered as apexing upon the senior location [the St. Louis] until it has wholly passed beyond its side line," but no further. And the court gave to the second location all of the apex within its lines, outside the side line of the St. Louis, although that portion was within the end line planes defining the extra-lateral rights of the St. Louis claim on the other vein. This decision is the best possible commentary on the *Walrath* case, and affords a complete refutation of the rule laid down in it.

*John Maxcy Zane.*

CHICAGO, ILLINOIS.

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<sup>1</sup> 102 Fed. Rep. 430.

<sup>2</sup> 102 Fed. Rep. 432; 104 Fed. Rep. 665.

<sup>3</sup> See diagram, 104 Fed. Rep. 665.

<sup>4</sup> *St. Louis M. Co. v. Montana M. Co.*, 104 Fed. Rep. 664, 669. It may have been an oversight on the part of the attorneys for the St. Louis that they did not cite the *Walrath* case and did not claim any more than the court gave them. But that would not justify the court in disregarding a principle which it had expressly held to be all controlling.

<sup>5</sup> *Walrath v. Champion M. Co.*, 72 Fed. Rep. 978.

<sup>6</sup> *Walrath v. Champion M. Co.*, 171 U. S. 293.

## DISCOVERY IN MASSACHUSETTS.

## PART I.

THE object of this article is to present a general view of the process of discovery in Massachusetts and of its possibilities for practical usefulness, and to place in proper perspective the peculiarities of the statutes and decisions on the subject. The attitude hitherto of the Massachusetts bar toward the system has been such that in 1898, in *Gunn v. N. Y., N. H., & H. R. R.*,<sup>1</sup> the court felt called upon to suggest to the bar that "there can be no doubt, we think, of its utility when properly administered." As this remark and the comparative scarcity of reported cases indicate, the practice of seeking discovery has not been so common as one might have expected in view of the opportunities offered by the statutes.<sup>2</sup> It is probably a common opinion among Massa-

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<sup>1</sup> 171 Mass. 417, at p. 421.

<sup>2</sup> Revised Laws of Massachusetts (1902), c. 173, §§ 57-67, 88:

SECTION 57. The plaintiff, after the entry of the action, and the defendant, after answer, or in a real or mixed action, after plea, and before the opening of the trial on the merits, may file in the clerk's office . . . interrogatories to the adverse party for the discovery of facts and documents material to the support or defence of the action.

SECTION 58 provides for an affidavit that there is reason to believe that the interrogating party will derive some material benefit from the discovery.

SECTION 59. Interrogatories shall be answered, and the answers shall be filed in the clerk's office, within ten days after notice of the filing thereof has been given to the party interrogated or to his attorney, unless, upon cause shown either before or after the expiration of said ten days, further time is allowed by the court. . . .

SECTION 60. Each interrogatory shall be answered separately and fully. The answers shall be in writing, under oath, and shall be signed by the party interrogated, who may introduce into his answer any matter relevant to the issue to which the interrogatory relates.

SECTION 61. If a corporation is a party to an action, the adverse party may examine the president, treasurer, clerk, or a director, manager or superintendent or other officer thereof, as if he were a party.

SECTION 62. If a document, book, voucher or other writing called for by an interrogatory contains matters not pertinent to the subject of the action, the answer may state such fact, and that such part has been sealed up or otherwise protected from examination; and thereupon such part shall not be inspected by the interrogating party, but he may apply to the court and obtain an order to inspect the part so protected from examination, or so much thereof as the court, upon a hearing, or if necessary, by its own inspection, shall find to have been improperly withheld and concealed.

chusetts lawyers that the filing of interrogatories before trial is, in the absence of special circumstances, either a waste of time and labor or inexpedient because of the danger of warning an opponent by asking him questions. Some lawyers, however, often file interrogatories, and as the use of statutory interrogatories is increasing, some discussion of the subject may be of service to the bar as well as of general interest.

The history of the process of discovery in the English courts<sup>1</sup> shows an accumulation of inconsistent precedents. A careful reconsideration by the Massachusetts courts of some of their earlier decisions and *dicta* will be necessary to develop the system along definite lines, and to avoid the confusion and the results of confusion presented by the English books and precedents.

Statutory discovery in Massachusetts dates back to the Practice Act of 1851. Before that time there were limited rights to discovery in equity, but there were only eight or ten reported cases, and bills for discovery were characterized by the commissioners who drafted the Practice Act as "expensive, dilatory, hampered by many technical rules, and from these and other causes, . . . in our practice as nearly useless as any remedy can well be." In 1849

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SECTION 63. The party interrogated shall not be obliged to answer a question or produce a document if it would tend to criminate him, or to disclose his title to any property the title whereof is not material to the trial of the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case.

SECTION 64. If an answer contains irrelevant matter, or if it is not full and clear, or if an interrogatory is not answered, and the party interrogated refuses to expunge or amend, or to answer a particular interrogatory, the court or a justice thereof may, upon motion, order such irrelevant matter to be expunged, or such imperfect answer to be made full and clear, or such interrogatory to be answered, within such time as it may order.

SECTION 65 provides for costs as the court may direct.

SECTION 66. If a party neglects or refuses to expunge, amend or answer according to the requirements of this chapter, the court may enter a nonsuit or default.

SECTION 67. If the court finds that due diligence has been used, it may allow interrogatories, with an affidavit stating the reason why they were not filed earlier, to be filed during the trial of an action. They shall be answered forthwith or with as little delay as practicable, and the court may suspend the trial for the purpose of having them answered.

SECTION 88. The answer of a party to interrogatories filed may be read by the other party as evidence at the trial. The party interrogated may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read; but if no part is read, the party interrogated shall in no way avail himself of his examination or of the fact that he has been examined.

<sup>1</sup> See 11 HARV. L. REV. pp. 137 and 205; 12 Ibid. 151; and Bray on Discovery, *passim*.

a commission was appointed, with Benjamin R. Curtis<sup>1</sup> as its chairman, to revise Court Proceedings; and after careful inquiry among the members of the profession, they submitted an interesting report, and a draft act which with few changes was enacted as Chapter 233 of the Acts of 1851.<sup>2</sup> The present Practice Act<sup>3</sup> is in outline and in many of its details the same as the draft submitted by the commissioners. In their report they introduced the interrogatory statutes by a discussion of the proposal to allow parties to take the stand. Having dismissed that question by saying that they did not think it for the interests of justice or of the public morals that parties should testify, they proceeded as follows:

"Nevertheless, it does not seldom happen that facts are known to parties alone, or that the means of proof are expensive and difficult to be had, or that the facts are not susceptible of denial, and no proof ought to be required; and in these cases it is clear there should be some means of compelling the parties to answer. This is now done by a bill of discovery filed on the equity side of the court; but this is a slow, expensive, and we think the experience of the profession will justify us in saying, almost a useless remedy.

"We propose to substitute for this a right to file interrogatories in writing touching any matter pertinent to the suit, which the party to whom they are addressed must answer on oath or affirmation. This has long been practised in courts of admiralty, and was introduced into the courts of Virginia some time since, and more recently into those of some other states. We believe it will be an extremely useful instrument, and will attain most of the benefits, without the evils of examining parties as witnesses on the stand."<sup>4</sup>

The Statute of 1856<sup>5</sup> allowing parties to testify removed one of the reasons specified by the commissioners for the introduction of the system of statutory discovery, but the system remains and has been extended to the courts of equity and probate.<sup>6</sup> The reason

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<sup>1</sup> Later Associate Justice of the Supreme Court of the United States. The other commissioners were Reuben A. Chapman, later Chief Justice of Massachusetts, and Nathaniel J. Lord, said to have been the leader of the Essex County bar at that time.

<sup>2</sup> The full text of the report, the draft act with notes, and the act as passed, are reprinted in Hall's *Mass. Practice* (1851). The act was revised in 1852. See St. 1852, c. 312.

<sup>3</sup> R. L., c. 173.

<sup>4</sup> Hall, *Mass. Practice*, p. 156.

<sup>5</sup> St. 1856, c. 188.

<sup>6</sup> The provisions for statutory interrogatories were extended to equity cases in 1855 (see St. 1855, c. 194, and St. 1862, c. 40, and R. L. c. 159, §§ 15, 16) after a report on equity practice by the same commission (Mass. Senate Doc. No. 67 of 1853), and to probate cases in 1879 (St. 1879, c. 186, R. L. c. 162, §§ 41, 42).

for its present existence and development is to be found in the fundamental principles of procedure.

The right to get discovery, or more properly the duty to give discovery,<sup>1</sup> exists as a part of a rational system of procedure to supplement pleading by defining issues and facilitating proof in order to expedite the trial. As a condition of administering justice to those who seek protection in its courts, the community imposes upon each litigant a duty to answer reasonable questions under the penalties of perjury, in order to eliminate undisputed matters and assist the court by affording the other party opportunity to present his case fairly and clearly. As Lord Redesdale expressed it, "the object of the court in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties."<sup>2</sup> The duty to give discovery, therefore, appears to be primarily a duty to the court, and although the system results in giving the parties absolute rights, yet, in criticising the system, the point of view of the court should be constantly kept in mind.

The Massachusetts courts are practically free to develop the statutory system in such manner as they think reason and efficiency demand, because the statutes provide a new system which is not necessarily governed by the rules of the English Chancery.<sup>3</sup> Furthermore, the courts are given very broad powers to regulate all procedure by rules of court,<sup>4</sup> without waiting for the legislature to act. As the use of the system of discovery increases, this power may be of great importance, and the doctrine of *stare decisis* does not seem to stand in the way of its exercise, because the law of discovery, being a part of administrative law which does not directly affect substantive rights, must develop as the business of the courts increases.

#### THE SCOPE OF THE RIGHT TO DISCOVERY — "FISHING."

Courts commonly profess to a rule against "fishing," but this rule is vague and of little value, because the object of filing every interrogatory is to fish, if the word is used in a broad sense. The question is, therefore, "To what extent should fishing be allowed, and to what extent is it allowed?" The Massachusetts authorities

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<sup>1</sup> Cf. 12 HARV. L. REV. 152.

<sup>2</sup> Mitford, Pleading, Pl. 191.

<sup>3</sup> See *Gunn v. N. Y., N. H., & H. R. R.*, 171 Mass. 417, at p. 420.

<sup>4</sup> R. L., c. 158, § 3.

seem to allow more fishing in equity cases than in cases under the statutes.

Shortly before the appointment of the revision commission, already mentioned, in the case of *Adams v. Porter*,<sup>1</sup> discovery was sought in equity in aid of an action at law. The defendant, citing English authority, objected that the bill pried into the defendant's case. On this point, Dewey, J., without discussing the details of the bill, said:

"Assuming the English rule to be what it is supposed to be by the defendant, yet it is not applicable in this Commonwealth. Our whole system of inquiry, by the instrumentality of a legal proceeding, has been that of full inquiry as to any and all facts that may impeach the right of property in the party of whom the inquiry is made."

The facts of the case do not seem to have required this broad statement. It has not since been discussed, and it may be that it would not be approved to-day even in equity. It has not, however, been contradicted.<sup>2</sup>

It was with the opinion of Judge Dewey fresh in their minds that the commissioners drafted the provisions for interrogatories. The statute passed on their recommendation gave parties a right to interrogate "for the discovery of facts and documents material to the support or defence of the suit." The first important opinion on the scope of discovery under this statute was that in *Wilson v. Webber*,<sup>3</sup> decided in 1854, three years after the Practice Act went into effect. The facts were as follows: the defendant in tort for breaking and entering plaintiff's close answered soil and freehold in himself, and filed the following interrogatory to the plaintiff:

"Please set forth in detail the title which you have, or claim to have, to the close described in your declaration. If you purchased it, state of whom you purchased it. If you acquired title in any other way, state particularly and in detail how you acquired title. Annex to your answer copies of all deeds or other instruments under which you claim to derive any title."

The court held that it need not be answered, and Bigelow, J.,<sup>4</sup> in speaking of Section 61 of Chapter 312 of the Acts of 1852 (now R. L., c. 173, § 57), said:

"Let us suppose a case where a plaintiff brings an action of contract for goods sold and delivered; the defendant, in his answer, denies the sale and

<sup>1</sup> 1 Cush. (Mass.) 170.

<sup>2</sup> 2 Gray (Mass.), 558.

<sup>3</sup> See *Haskell v. Haskell*, 3 Cush. (Mass.) 540.

<sup>4</sup> Later he became Chief Justice.



delivery, or alleges his ignorance thereof, and requires proof of those facts by the plaintiff, and also sets up the defence of release, or accord and satisfaction. In such a case, the plaintiff could not ask the defendant to disclose any facts or documents tending to prove the release, or accord and satisfaction, because they would not be, strictly speaking, in support of the plaintiff's case; but he might interrogate him concerning the sale and delivery of the property, that being the case which the plaintiff is bound to prove. On the other hand, the defendant might require of the plaintiff a disclosure of facts tending to establish the release, or the accord and satisfaction, because they would directly tend to support the defence; but he could not inquire concerning the proof of the sale and delivery of the property to himself. . . .

"If there were any doubt as to the true construction of Section 61 of the statute, by which the right to interrogate is given, it is made entirely clear by Section 69,<sup>1</sup> which imposes a restriction on the right. It is there provided that the party interrogated shall not be required to 'disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his case.' This provision is entirely inconsistent with the theory that by Section 61 a right was given to a party to seek by interrogatories a disclosure of the case that was to be set up against him; because such a right could not be exercised to any effective purpose under such a restriction as is imposed by Section 69. It is difficult to imagine a question relative to material facts in support of a case against a party the answer to which would not necessarily involve a disclosure of the mode of its proof. Take the case already supposed; a defendant could not well ask material questions concerning the time, place, or circumstances of the sale and delivery of goods, which would not require the plaintiff to disclose, in some degree, the proof on which he might rely to sustain his case; and so, on the other hand, the plaintiff could not inquire into material facts tending to establish a release, or accord and satisfaction, without compelling the defendant to develop some part of the case which he must prove in order to sustain his defence. It is very clear, therefore, that this restriction is inconsistent with a right to interrogate a party concerning the proofs of his own case; and was intended to restrain the right to require a disclosure, *to matters in aid of a case to be established*<sup>2</sup> against the party interrogated."

The doctrine of this opinion<sup>3</sup> appears to be very different from that of *Adams v. Porter*, and it is noticeable that although the English equity practice was referred to by Judge Bigelow in *Wilson v. Webber*, yet he did not mention *Adams v. Porter* or the doctrine therein stated as the general doctrine of Massachusetts.

<sup>1</sup> Now R. L., c. 173, § 63.

<sup>2</sup> The italics are the writer's.

<sup>3</sup> Cf. *Davis v. Mills*, 163 Mass. 481.

Tested by the standard of reasonableness, the decision in *Wilson v. Webber* was unquestionably correct. But it may well be doubted whether the learned judge would have expressed himself in such general terms if the interrogatory before him had been properly drawn. As it is, the general remarks are likely to be used in support of the proposition, that the party's right to interrogate depends upon the appearance of an affirmative case in his pleadings, and that interrogatories under a negative plea for the purpose of defeating the affirmative case of the other party are not authorized. There appears to be a more or less common impression that this is the law; but it is submitted that such a proposition puts a construction upon the statutes which the language does not require, which is opposed to the principles of discovery and to the intention of those who passed the statutes, and which is unfair to the negative pleader.

Taking the illustration, used by Judge Bigelow, of a suit for goods sold and delivered, in which the defendant denies the sale and delivery and sets up a release, let us suppose that under the general negative plea the defendant proposes to show that, although the goods were delivered to him, credit was given to a third person; and suppose the plaintiff, on the issue of the release, proposes to show that the release was snatched from him and never given. From the point of view of pleading and the burden of establishing, both the plaintiff and the defendant would have an affirmative and a negative case, and if the language quoted from the opinion of Judge Bigelow is taken literally, each could interrogate as to his affirmative case, but neither could interrogate in support of his negative case, although the facts to be proved under it were affirmative. The arbitrary and unreasonable character of a system which would produce such results seems a sufficient answer to the claim that such a system was intended by the legislature, and in the leading case of *Baker v. Carpenter*<sup>1</sup> the court decided that a defendant who had specified in his answer facts which might have been shown under a general denial in "disproof" of his opponent's case, might interrogate in support of his answer.

The relation of each party to the facts in a case was clearly stated in the recent case of *Robbins v. Brockton, etc., Ry.*,<sup>2</sup> by Chief Justice Holmes when he said:

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<sup>1</sup> 127 Mass. 226.

<sup>2</sup> 61 N. E. Rep. 265.

"The facts are a part of the plaintiff's case none the less that the defendant's case may consist in pressing a different view as to what the facts were."

This shows that the case of a party is his view of the facts. Whether or not the facts support his case cannot be known until the court or jury find the facts, but it is in order that he may support his view of what happened that he has a right to interrogate. It is clearly immaterial whether his view is expressed in a declaration or in a general denial, or whether the answers sought may contain evidence material to the support of both views.

The test of the right to discovery is also distinct from the test of admissibility at the trial, as no court can decide on the competency of evidence until it is offered at the trial. The reasonable rule appropriate to the system seems to be that in order to interrogate, the interrogating party must disclose his own case either in his pleadings or in his question sufficiently to show the court that he is not "merely fishing," and that the answers sought may reasonably be legitimately useful in preparing to support his view of the facts as indicated in his specifications. The present rules of pleading do not require specifications as to many matters, but the right to interrogate does require specifications, and it is reasonable that it should. Such specifications for discovery, it would seem, may be either in the form of pleadings, or in the form of questions which may be answered by "yes" or "no," or in the form of an offer of proof introducing interrogatories which support it.

If, in *Wilson v. Webber* above cited, the defendant had asked, "Have you not in your possession or control a paper purporting to be a lease to you from A. B. of the premises in question endorsed 'This lease is hereby surrendered by mutual consent' or with some similar words? if yea, give discovery thereof;" it is submitted that he would have been entitled to an answer.

#### DISCOVERY OF THE NAMES OF WITNESSES.

The statute providing that a party shall not be required to "disclose the names of the witnesses by whom, or the manner in which he proposes to prove his case" raises the question whether a party can interrogate as to the names of persons likely to know about a case.

In a case of tort for damage from negligent driving of the

defendant's teamster, the Superior Court has refused to order the disclosure of the name and address of the teamster on a statement of intention by the defendant that he intended to call him at the trial. This is probably the ordinary practice of judges in this matter; but it is submitted that such practice goes beyond the provisions of the statute and defeats the object of the other sections.

It may be said that there is a reason of public policy based on the fear of encouraging perjury and subornation of perjury by giving an opportunity to tamper with witnesses; and formerly this would have been regarded as a strong argument, because public policy favored secrecy, and not only excluded parties as witnesses, but in equity cases required all testimony to be taken secretly. Such rules have been abolished, however, and public policy does not seem to furnish a sufficient reason for drawing an arbitrary line in the law of discovery. The arbitrary character of the line drawn by the ruling above referred to appears forcibly in the opinion of Lord Langdale in *Storey v. Lennox*,<sup>1</sup> a case in which he discussed the production of certain letters as follows:

"The defence is that the letters may disclose the names of the witnesses and the evidence, and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which may enable the plaintiff to learn the names of the witnesses and the nature of the evidence: and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of courts of equity would be lost. It occurs constantly to ask the defendant when, where, and in whose presence particular transactions took place, and he cannot protect himself by saying that to tell in whose presence the transactions took place would disclose the names of his witnesses." <sup>2</sup>

A question calling upon a party to state the name and address of a teamster who drove a team on a certain occasion does not ask for a statement that the party is going to call him, or for a statement of what he knows or how the party interrogated expects to use him. Here again the form of the question is important, and it is submitted that the statute is limited to protection against "merely fishing" questions such as: "Who knows about the case, and what do you propose to do?" — questions of which the interrogatory above quoted from *Wilson v. Webber* is a good illustra-

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<sup>1</sup> 1 Keen, 341, at p. 357.

<sup>2</sup> Cf. interrogatories in *Todd v. Bishop*, 136 Mass. at p. 388.

tion. The function of a court is not to protect a party from evidence of a just claim, and the disclosure, in answer to specific questions, of the names and addresses of persons actually concerned either as participants in, or observers of, an action inquired into, is a most important requirement in the system of discovery, the primary object of which is to enable a party to prepare for trial. A document is not protected because it may contain evidence for both parties and because the party interrogated may intend to use it in evidence,<sup>1</sup> and what logical or practical reason is there for distinguishing between a document which may contain evidence relevant to the issues in a case and an individual who may contain evidence relevant to the issues in a case?

If a party is to be allowed to withhold the names of persons on the ground that they are his witnesses, he should certainly be required to state that ground in his answer under oath and to produce the persons at the trial. Otherwise he is given the benefit of the statute without complying with it.

#### THE DISCOVERY OF THE UNOFFICIAL KNOWLEDGE OF CORPORATE OFFICERS.

The present statute<sup>2</sup> provides that

“If a corporation is a party to an action the adverse party may examine the president, treasurer, clerk or a director, manager, or superintendent or other officer thereof, as if he were a party.”

Under a statute substantially similar to this arose the case of *Hancock v. Franklin Ins. Co.*,<sup>3</sup> in which plaintiff interrogated the president of the defendant corporation. The court held that the interrogatories need not be answered since they did not appear to call for any official information, and apparently inquired as to his personal knowledge of such facts as he could only state as a witness on the stand or in a deposition.

This reasoning seems questionable. It was not fully discussed in the opinion; it does not appear to have been fully argued, and it puts a limit on statutory discovery from corporations which is not required by the statute. In *Wright v. Dame*<sup>4</sup> the court allowed

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<sup>1</sup> See *Wilson v. Webber*, 2 Gray (Mass.) at p. 561; and see *Bray on Discovery*, 183ff. See *Peck v. Ashley*, 12 Metc. (Mass.) 478.

<sup>2</sup> R. L., c. 173, § 61.

<sup>3</sup> 107 Mass. 113.

<sup>4</sup> 1 Metc. (Mass.) 237.

a mere corporator who held no office to be made a party to a bill in equity for relief merely for the purpose of obtaining discovery from him. The court based its opinion expressly on the ground that, although the answers could not be read in evidence against the corporation, they might be of great assistance in preparing for trial, since the individuals who were not officers might be those only who knew the facts sought to be discovered.

To the objection that the corporator could be examined as a witness, the court replied that the examination of the corporator as a party was obviously much more beneficial than an examination of him as a witness.

The court in 1840, therefore, did not regard the right to discovery from a corporation as limited either by law or policy to the searching of the corporation's official conscience, but thought it fair that a party should have the assistance of the actual knowledge of those interested in the concern. The statute above quoted allows interrogatories to be put only to officers of a company; but there is nothing in the statutes limiting the scope of discovery in the manner stated in the opinion in *Hancock v. Franklin Ins. Co.* above cited. On the contrary, the presumption seems to be that, as the case of *Wright v. Dame* must have been considered by the commissioners on the Practice Act of 1851, they intended to limit only the number of persons who might be interrogated, and that, if they had intended to limit the matter which might be inquired into, they would have said so. This view is strengthened by the wording of the statute, which says that a party may examine the officer of a corporation "as if he were a party." It seems quite probable that this language was taken directly from the opinion in *Wright v. Dame*.

As will appear later, the corporate officer must make reasonable search among the agents and other sources of information which are at the service of the company. It is surely the duty of a corporate officer to give the corporation in the management of its affairs the benefit of such knowledge of facts as he can disclose without breach of confidence to others, even if he acquired the knowledge before he was connected with the corporation; and it seems most illogical, therefore, to hold that an officer must inquire of others, but not of himself, although he has material information which is at the service of the corporation. In other words, the "personal knowledge" of the officer in *Hancock v. Franklin Ins.*

Co. was "official information," and therefore a proper subject for discovery under the court's own test.<sup>1</sup>

The policy, for which the case of *Wright v. Dame* stands, of allowing discovery of the actual as well as the official knowledge of the representatives of a corporation, seems a sound one. The corporation is not charged with the personal knowledge of its officer merely because he answers interrogatories; his personal knowledge is sought not as a basis of suit, but as an aid to the preparation of proof; and the question of policy is, "Shall he be allowed to decide whether some inconvenient question calls for his personal or his official information?" It is submitted that he should be obliged to answer as to both. After he has answered, questions of evidence or of substantive law may arise as to the extent to which his statement may be used to prove, or his knowledge may create, a liability of the body of which he is a representative; but such questions are distinct from the question of the duty to make discovery, which is primarily a duty to the court. Whatever may be thought of these views of policy, the case of *Wright v. Dame* is law to-day for equity cases,<sup>2</sup> and may in some cases furnish a strong reason for seeking discovery in equity, instead of, or in addition to, the filing of interrogatories under the statute.

#### THE DUTY TO INVESTIGATE BEFORE ANSWERING.

An officer of a corporation must investigate, and the extent of his duty has been recently discussed by Chief Justice Holmes in the case of *Robbins v. Brockton, etc., St. Ry.*<sup>3</sup> as follows:

"The president stands in the place of the corporation, and the corporation, being reputed to have done whatever its servants did in the course of their employment, is supposed to know what they did, and therefore cannot shelter itself under a general profession of personal ignorance on the part of its president. . . . Of course the knowledge of the corporation is a fiction and therefore its obligation to answer is not to be pressed beyond what is reasonable. . . . But if in the case of an accident like the present the servants concerned are still in the employ of the company and within convenient reach, they must be inquired of concerning facts, which the plaintiff has a right to know. If the result of inquiry is to satisfy the president's mind as to any of the material facts or circumstances, he must answer interrogatories in proper form which call for them. . . .

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<sup>1</sup> Cf., however, *Gunn v. N. Y., N. H. & H. R. R.*, 171 Mass. at p. 421.

<sup>2</sup> See R. L., c 203, § 13.

<sup>3</sup> 61 N. E. Rep. 265.



"But the right to interrogate is not a right to abridge the other party's right to try any fairly doubtful fact. . . . If the president can say with truth, after reasonable inquiry, that he is unable to ascertain what the facts are, an answer to that effect would be enough."

This is perhaps as definite a statement as can be made of the general rule. The application must be left to the good sense of the trial judge, subject to exception to his action on a particular question, as in any case involving the application of general rules. The reasons for requiring investigation apply as well to the case of an individual party as to that of a corporate officer, and this is recognized in the authorities.

The duty of the party interrogated being to make reasonable investigation, how is the question of reasonableness to be decided? It is obviously a question for the court, and the only way of bringing it fairly before the court is by affidavit, showing the details of search made and the facts relied on as the excuse from further search. The excuse, if valid, is part of the answer<sup>1</sup> and should be supported by oath as much as any other part of the answer.

In this connection it is important to remember that the process for discovery is a searching of the conscience of a party, and the requirement that a party shall inquire of his agents and answer on information and belief, is made necessary by the organization of business. It is necessarily inconvenient for a party to investigate; and as there is a natural tendency to economize in matters of conscience under such circumstances, the value of discovery to the party who seeks it, of course, depends largely on the moral standards of the person who is called upon to swear to the answers as well as on the skill and care (or lack of skill and care) of his attorney in drawing the answers.

If a party or officer will "say with truth after reasonable inquiry" whether or not he is able to ascertain the facts, his examination may be of more use to the interrogating party than even a cross-examination of the party or officer; for on cross-examination the personal knowledge of the witness would limit his answers. If matters have been skilfully planned in a large concern, the party or officer examined may have been kept in ignorance of the matters inquired into, and therefore a conscientious inquiry and answer to interrogatories by such person may elucidate matters which could not be reached by cross-examination. This fact makes

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<sup>1</sup> *Hobbs v. Stone*, 5 Allen (Mass.) 109.

it especially important that the court should be informed as to the extent of the inquiry made.

#### DISCOVERY IN SUITS ON ASSIGNED CLAIMS.

The most doubtful question as to the duty to investigate arises in suits on assigned claims.

Revised Laws, Chapter 173, Section 4, provides that

"the assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defences and rights of counter-claim, recoupment, or set-off, to which the defendant would have been entitled had the action been brought in the name of the assignor."

In a suit brought under this section by an assignee who has slight knowledge or a short memory, there seems to be no way for a defendant to get discovery from the assignor, unless it can be done indirectly. The assignor not being a party of record does not come within the terms of Section 57, which give the right to interrogate "the adverse party."

The statute above quoted (Section 4) was passed in 1897,<sup>1</sup> and it is interesting to note that, forty-six years before, the commissioners on the Practice Act recommended a still broader provision for suits on assigned claims. The Act as reported by the commissioners contained the following sections:

"SECTION 3. The assignee of a contract not negotiable may sue in his own name, but without prejudice to any set-off or other defence which might have been made if the action had been in the name of the assignor, who in no case shall be called as a witness by the plaintiff, but may be called as a witness by the defendant, and may be examined on interrogatories by the defendant, as if the action were in the name of the assignor."<sup>2</sup>

"SECTION 117. When any assignor of a claim sued in the name of the assignee, shall neglect or refuse to obey any lawful order of the court, or any justice thereof, respecting any answer to any interrogatory, he may be attached as for a contempt, and proceeded with, as is provided by law. in case of witnesses guilty of contempt."

"SECTION 118. When any such assignor shall be examined upon interrogatories by the defendant, the plaintiff may also examine him upon any interrogatories pertinent to the subject of the action."

"SECTION 119. The answer of each party, an assignor for this purpose being deemed a party, may be read," etc.<sup>3</sup>

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<sup>1</sup> St. 1897, c. 402.

<sup>2</sup> Hall, Mass Practice, 162.

<sup>3</sup> Ibid. 197.

All these sections were stricken out by the Joint Legislative Committee and were not included in the final act. As a matter of policy, however, tested from the point of view of the court imposing reasonable conditions on litigants in order to expedite the administration of justice, these recommendations of the commissioners are entitled to great weight and may be considered as improvements on the present law which has suited the convenience of a plaintiff without protecting the defendant. Now, a plaintiff in a suit on an assigned claim has the advantage of ignorance over a defendant in the matter of discovery, unless the courts treat the present law as sufficiently elastic to obviate the evil. It seems possible to reach the assignor under the present law indirectly by requiring the plaintiff assignee in answering interrogatories to inquire of the assignor and to state the results of his inquiry. If a party can buy a claim, he may fairly be expected to buy his assignor's knowledge of the facts also. He could, it seems, bring a bill in equity against his assignor in aid of his suit.<sup>1</sup> Should it not be held that reasonable search by an assignee included and required full disclosure of what his assignor knew?<sup>2</sup>

It seems also that under the reasoning in *Wright v. Dame*, already discussed, a bill in equity for discovery might lie against the assignor in favor of the defendant in a suit on an assigned claim. The assignor is interested in the success of the suit. If he has received no value and the suit is brought for his benefit, then he will profit directly by the success of the suit. If he has received value he has profited, and if there is a good defence to the claim he will have profited unfairly at the expense of the defendant, unless the defence is proved. These seem to be strong reasons why the court should assist such a defendant, if he sees fit to go to the trouble and expense of filing a bill in equity against the assignor to obtain assistance in his defence. Moreover, the statute allowing suit in the assignee's name expresses the intention of preserving the rights of the defendant, and one of those rights was the right to seek discovery in equity. The objection to the course suggested is that the rule in *Wright v. Dame* has been regarded as an exception originated by Lord Talbot in *Wyche v. Neal*<sup>3</sup> on grounds of practical justice, the general principle being that one who is merely a witness against whom no relief is prayed cannot be made a party

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<sup>1</sup> Cf. *Day v. Drake*, 3 Sim. 64.

<sup>2</sup> Cf. *Stern v. Filene*, 14 Allen (Mass.) 9, 10, 12.

<sup>3</sup> 3 P. Wms. 311. Cf. on this whole topic Hare on Discovery (2d American ed.), part i. chap. ii. pp. 63-88.

to a bill merely for the purpose of discovery. In order to reach the assignor in equity, therefore, it might be necessary to frame a bill for relief rather than discovery.

In the second part of this article the following topics will be discussed: "The Right to Qualify Answers;" "The Use of Interrogatories at Trial;" "The Admissibility of Answers in Evidence;" "The Duty of the Court to Protect the Right of Privacy;" "The Penalty for Failure to Answer;" "The Power to Enforce Answer by Contempt Proceedings;" "Discovery in Equity;" "Can Interrogatories be Inserted in a Bill for Relief?" "Can a Party Get Discovery both by Bill and Statutory Process in the same Case?"

*Frank W. Grinnell.*

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# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table : —

	1891-92.	1892-93.	1893-94.	1894-95.	1895-96.	1896-97.
Res. Grad. . . . .	—	—	—	—	—	—
Third year . . . . .	48	69	66	82	96	93
Second year . . . . .	112	119	122	135	138	179
First year . . . . .	142	135	140	172	224	169
Specials . . . . .	61	71	23	13	9	31
Total . . . . .	363	394	351	402	467	472

	1897-98.	1898-99.	1899-1900.	1900-01.	1901-02.	1902-03.
Res. Grad. . . . .	1	1	—	1	1	—
Third year . . . . .	130	102	134	144	149	167
Second year . . . . .	157	169	193	202	190	196
First year . . . . .	216	218	232	241	229	228
Specials . . . . .	41	58	51	58	59	49
Total . . . . .	545	548	610	646	628	640

The total registration is larger than last year, although there is no increase in the number of first year students and a decrease in the number of specials. But the percentage of those who have returned to the second and third year classes is noticeably greater than ever before.

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts : —

## HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68

## GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128

## HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228

As the thirty-two Harvard seniors in the first year class have in each instance completed the work required for the Harvard A. B. degree, all members of the class are virtually college graduates. The same is true of practically the entire School, since seven special students are the only members who have not received a degree. Of the forty-nine special students, twenty-one have entered this year, and of these nineteen are graduates of a college or university, eight having received a degree in Law.

Ninety-four colleges and universities have representatives now in the School as compared with ninety-two last year and eighty-two the previous year. In the first year class fifty-six colleges and universities, as compared with forty-four last year, are represented, as follows: Harvard, 68; Yale, 14; California, Dartmouth, 9; Brown, 8; Amherst, Bowdoin, Princeton, 5;

Iowa College, Williams, 4 ; Cornell University, University of Illinois, Johns Hopkins, Leland Stanford, Jr., Tufts, Wisconsin, 3 ; Bates, Colby, Cornell College, Kansas State, Knox, Minnesota, Northwestern, Vermont, Washington and Jefferson, Wesleyan (Conn.), 2 ; Antioch. Berlin, Central, Chicago, Depauw, Denison, Dickinson, Earlham, Emory, Fordham, Georgetown College, Georgetown University, Holy Cross, Illinois College, Indianapolis, Iowa University, Iowa Wesleyan, Leipzig, Mass. Inst. Technology, Miami, Middlebury, Mt. Allison, New Brunswick, College City of New York, Oxford, Pomona, Richmond, Trinity, Western Reserve, Wooster, 1. There are at present in the School nine Law School graduates, of whom seven have received also an academic degree, representing the following Law Schools : Cincinnati, Highland Park, Indiana, Iowa University, Kansas City, Kings College (Windsor), Washington and Lee (2).

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A CORRECTION. — It has been brought to our attention that a review of "Trade Union Law and Cases," in 15 HARVARD LAW REVIEW at page 81, is susceptible of misinterpretation. We there said : "As the authors state, the book is not intended to be a legal treatise, but rather a working guide and manual for any one who has occasion to know and act on the present English law as to trade unions." Mr. Cohen, to whom the larger part of the volume is to be attributed, takes exception to our statement that "the book is not intended to be a legal treatise," and infers that we regarded the book as not intended for use by lawyers. Such was not our meaning. It was rather that the book was not a *treatise*, in the sense of being an exhaustive theoretical discussion, but was merely a working manual or compilation of cases for the use of "*any one* who has occasion to know and act on the English law as to trade unions," including lawyers as well as laymen. The correction of any misapprehension as to our estimate of the book is gladly made.

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THE AMERICAN EXTENSION OF THE DOCTRINE OF DEDICATION. — Originally the rights which could be acquired by dedication at common law in England and America were limited to easements of way over roads and bridges. See *Baker v. Johnston*, 21 Mich. 319 ; *Post v. Pearsal*, 22 Wend. (N. Y.) 425. But in America the doctrine of dedication has been extended to parks and cemeteries. *Commonwealth v. Bowman*, 3 Pa. St. 202 ; *Redwood Cemetery Association v. Bandy*, 93 Ind. 246. This extension has had different lines of development. Cases where the parks were of an ornamental nature and so small as to be regarded as mere widenings of the roads, readily came to be regarded as within the rule. See *State v. Wilkinson*, 2 Vt. 480. But the broadening of the rule so as to include cemeteries and large parks appears to have arisen from a misconception of the case of *Pawlett v. Clark*, 9 Cranch (U. S. Sup. Ct.) 292. In that case land was conveyed for the purpose of establishing a church, but no existing grantee was named in the deed. The grant was given effect on an anomalous doctrine applying only to grants for the foundation of a church, according to which the fee may be in abeyance until the grantee comes into existence. The court went on to say, however, that the familiar case of the dedication of public streets and highways was similar to that which they were considering. In



*Beatty v. Kurtz*, 2 Pet. (U. S. Sup. Ct.) 566, and *Cincinnati v. White*, 6 Ibid. 431, the court placed its decision upon this *dictum*, which it regarded as the *ratio decidendi* of the earlier case. The rights in question related to burial grounds and to a park, and the decisions of the court accordingly extended dedication to such subject matter. The old doctrine in regard to grants for the establishment of a church, it is true, is in one respect analogous to dedication, in that the recipient of the beneficial rights is in both cases incapable of taking the legal title to the property; and that seems to be the sole force of the *dictum* in *Pawlett v. Clark*, *supra*.

The subject has been recently brought to notice by a Vermont case. The facts were in general similar to those in *Pawlett v. Clark*, *supra*, except that the purpose of the donation was to establish a cemetery instead of a church. Here it was decided that a charitable trust had been created. *Hunt v. Tolles*, 52 Atl. Rep. 1042. The decision is clearly correct, for here there was a writing sufficient to establish a trust within the Statute of Frauds; but the court, by citing as the chief authority *Beatty v. Kurtz*, *supra*, where there was no such writing, shows a failure to distinguish between a dedication and a charitable trust.

Even supposing that a writing had been lacking in the principal case, the court must have reached the same conclusion. For when the people have buried their dead with the acquiescence of the owner of the land, it would be a shocking decision which would recognize no public rights therein. A ground broad enough to support all such cases, including even those where there is no writing on which to base a charitable trust, is found in the principles of equitable estoppel. A few courts have said that dedication itself is but an application of these principles. See *Cincinnati v. White*, *supra*. But this view has been strongly opposed by some text-writers. See ANGELL, HIGHWAYS, § 156. And since the acts necessary to show the intent to accept the dedication would often not be such as to furnish ground for equitable estoppel, the criticism seems just. Dedication correctly understood is a method of transferring interests in realty, peculiar to itself because of the anomalous character of the recipient of the rights. See 14 HARV. L. REV. 65. Equitable estoppel is quite another matter. It arises when a man by his conduct has acquiesced in the actions of others until they have placed themselves in such a position that it would be unjust and unconscionable for him to exercise his full legal rights. This principle has already been clearly recognized and applied to the class of cases under discussion; *McClain v. School Directors, etc.*, 51 Pa. St. 196; and see *Shroder v. Wanzor*, 36 Hun (N. Y.) 423. It also underlies a similar class where a parol promise to convey realty within the Statute of Frauds is enforced because of a consequent change of position by the promisee in regard to the land. See 15 HARV. L. REV. 157. A careful discrimination between the principles governing grants for the establishment of churches, dedication, charitable trusts, and equitable estoppel, would lead to a more satisfactory condition of the law.

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VESTED RIGHTS IN THE DEFENSE OF THE STATUTE OF LIMITATIONS. — The degree of protection afforded defenses to an action by the provision of the Fourteenth Amendment that no state shall "deprive any person of property without due process of law," and by the similar provisions in the state constitutions, has not yet been fully determined. The theoretically correct

rule would seem to be that a fully matured defense cannot be destroyed by legislative enactment, since the practical result of such action would be the taking of property previously free. Important modifications, however, have been made by the courts. A wise and necessary, though not strictly defined, exception is found in remedial legislation; defenses based not on any equity in the defendant, but purely on informalities and technical mistakes, can be removed when justice demands it. *Danforth v. Groton Water Co.*, 178 Mass. 472. Certain other cases which may be regarded as forming a second exception, arise when the legislature has provided remedies for rights which had been lying dormant. *Hewitt v. Wilcox*, 42 Mass. 154; *Ewell v. Daggs*, 108 U. S. 143. In the former of these cases the court held that the repeal of a statute which had barred unlicensed physicians from recovering fees, authorized recovery for past services. In cases of this sort the defense is based not on any equity of the defendant but on a disqualification of the plaintiff; and it would be going far to say that there is a vested right in such a defense. A third exception has been made by the United States Supreme Court in holding that a legislature can constitutionally remove the bar of the statute of limitations on contract claims. It is argued that the statute bars only the remedy—as is shown by the revival of the obligation under a new promise—and that this artificial defense can be removed by the same power that created it. *Campbell v. Holt*, 115 U. S. 620. Influenced by this case and by a desire to obtain “substantial justice,” the Massachusetts Court in a recent case holds constitutional an act extending the period of limitation, after the original period had expired, on claims against a railroad for damages caused by a change of grade. *Dunbar v. Boston & P. R. Corp.*, 63 N. E. Rep. 916 (Mass.).

It is submitted with deference that these two cases carry too far the exceptions to the rule that a matured defense cannot be destroyed by the legislature. The legislation in these cases cannot be called remedial, since no merely technical mistake or evident injustice was involved; it was only the expression of a doubtful change of policy on the part of the legislature. The distinction between these cases and those represented by *Hewitt v. Wilcox*, *supra*, is brought out by comparing the different policies underlying the statutes which created the defenses. In the latter the object was not to free patients from the obligation to pay their bills, because of any right on their part, but to prevent unlicensed physicians from practicing. In the former the statute recognizes a right in the debtor arising from the lapse of time, and is based on that as well as on the delay and negligence of the creditor. It is conceded that the title to property given by the statute cannot be impaired. *McEldowney v. Wyatt*, 44 W. Va. 711. 45 L. R. A. 609. In the case of contract rights the party originally at fault has had no opportunity to acquire title, but he has gained a real right to have existing conditions remain unchanged. Again, it is argued that the defense of the statute simply gives an opportunity to escape from a just debt. If a defense mainly produces injustice, the legislature should abolish it for the future. But the statute of limitations cannot be so regarded; it certainly operates as justly in freeing debtors as in giving title to thieves,—a result generally approved.

The courts might have confined themselves to the support of strictly remedial legislation. Since they extend their support of the legislatures beyond that, it would seem wise to make the test the existence of a positive right in the defendant, as distinguished from a mere lack of a remedy in

the plaintiff. It is submitted that such a test would place the defense of the statute of limitations in all classes of cases under the protection of the constitution.

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**JUDGMENT OR SATISFACTION: WHICH PASSES TITLE?** — There has been much confusion as to whether title to a chattel in an action of trover or trespass for its value passes on judgment, or only on satisfaction of that judgment, and it is usually attempted to lay down a rule on the subject dogmatically one way or the other. There seems to be little recognition that title in fact vests sometimes on satisfaction and sometimes on judgment, and that it may well be doubted whether either circumstance goes sufficiently to the essence of the matter to make a rule on the point necessary. A recent decision in Pennsylvania deciding that under the circumstances of that case title passed on judgment makes it interesting to look into the question. *Singer Co. v. Yaduskie*, 59 Leg. Intell. 367, 11 Pa. Dist. Ct. Rep. 571.

The confusion arises largely from a failure to notice that there are two classes of cases, namely, the class where the judgment in question is against him who at the time of judgment has the chattel in possession, and the class where it is against him who at the time of judgment does not have it in possession. Suppose A is wrongfully dispossessed of a chattel by B, he has the option of bringing either replevin or detinue to recover the possession, or trespass or trover to recover its value, in which latter event he leaves the possession where it is. Whichever action he brings, by the rule of *res judicata*, from the moment of judgment he is barred against bringing any further action against B for the same wrong. *Rembert v. Hally*, 10 Humph. (Tenn.) 513. If at that moment B happens to be in possession of the chattel, since the only person in all the world who could legally have deprived him of it is now barred, B has virtual ownership. *Barb v. Fish*, 8 Blackf. (Ind.) 481, 485-6. The chattel becomes liable to seizure on execution for B's debts. *Rogers v. Moore*, Rice (S. C.) 60. And since he has possession coupled with unlimited right of possession, which is equal to title, a purchaser from him ought to get a perfect title. See 3 HARV. L. REV. 326. Here, as is seen, B at the time of judgment had possession of the chattel, and title therefore passed on judgment. This represents the first class of cases. In them title should always pass on judgment. And the principal case, which falls into this class, would therefore seem to be correct.

But suppose B, before judgment rendered and title thus acquired, passes the chattel to C. Surely C gets no greater right than B had, and A acquires an immediate right to recover against him also. Nor is A's right of action against C barred, or his title to the chattel affected, by a subsequent judgment obtained against B; for the rule of *res judicata* applies only when the parties are the same in both suits. There are only two ways in which A's title can be affected: one is by a judgment against C, which would throw the case into the first class, and title would therefore pass upon judgment; the other is by satisfaction of the judgment against B. In this latter case a new rule would come into play, namely, that one should not be twice recompensed for the same injury, so that C would be freed from action by A. C therefore would get title as against A, and, if B had no claims, title as against all the world. Title would pass on satisfaction. This represents the second class of cases, and in this class are found most of the authorities

usually relied upon to establish the doctrine that title vests upon satisfaction only. *Miller v. Hyde*, 161 Mass 472; *Atwater v. Tupper*, 45 Conn. 144. In this second class should be included another set of cases where satisfaction becomes important. B and C, instead of being successive holders of the chattel, may have jointly dispossessed A. In such a case a judgment against B would of course be no bar to a later recovery against C. *Lovejoy v. Murray*, 3 Wall. (U. S. Sup. Ct.) 1; but see *Hunt v. Bates*, 7 R. I. 217. Yet, as noticed in the discussion above, if the judgment against B is satisfied, the suit against C would fail. *Lovejoy v. Murray*, *supra*, p. 17.

If the views expressed are correct, it will be seen that neither satisfaction nor judgment is so connected with the essence of the matter as to be conclusive. Yet, as a working rule, the conclusion may be drawn that title to a chattel vests on judgment when the judgment is against him who at the time of judgment has the chattel in possession, otherwise it vests on satisfaction.

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CONTRACTS LIMITING LIABILITY OF INTERSTATE CARRIERS. — Such confusion exists on the question as to what law shall govern a contract limiting the liability of an interstate carrier that a recent, clearly reasoned case should prove of value. A railroad in New York contracted to carry a horse into Pennsylvania, stipulating that the liability of every carrier concerned should be limited to \$100. Such contracts are valid in New York, but are considered against public policy in Pennsylvania. Owing to the defendant's negligence, the horse was injured in Pennsylvania. The Supreme Court of that state held that though the contract must be read in the light of New York law, yet the cause of action, having arisen in Pennsylvania, must be determined by the rules in force in that state. *Hughes v. Penn. R. R. Co.*, 51 Atl. Rep. 990.

The basis of the plaintiff's right in this and similar cases is primarily the liability of a common carrier as such. All contracts limiting this liability are therefore mere defenses. This being so, it matters little whether the plaintiff sues in tort or in contract, because performance is an event and therefore the rights and liabilities arising therefrom must be governed by the laws of the place where it happens. Thus in the principal case the defendant's negligent act occurred in Pennsylvania, and legal consequences thereof must obviously be determined by the law of that state. To avoid liability the defendant sets up a contract, to which the replication is that though the contract is valid where made — and its validity is to be determined solely by the law of that place — it is not the sort of contract that Pennsylvania courts permit as a defense to a Pennsylvania cause of action. Had the event happened in New York, the Pennsylvania court would have properly applied the New York rules of law. *Forepaugh v. Del. L. & W. R. R. Co.*, 128 Pa. St. 217. And it is not necessary that the contract be made and the event happen within the same state. Provided that both the states uphold the validity of such contracts, the courts of any other state must apply that law when a case arises for their adjudication. *Talbott v. Merchants, etc., Co.*, 41 Ia. 247.

Opposed to these cases is a decision that a Pennsylvania statute cannot limit the amount to be recovered by a passenger who bought his ticket in New York, even though he was injured in the former state. *Dike v. Erie Ry.*, 45 N. Y. 113. This is a nice point, but the court apparently erred in refusing to permit the legislature of Pennsylvania to decide upon the limit

of liability for a cause of action arising in Pennsylvania. Perhaps a more obviously incorrect case is one holding that when goods were shipped from New York to Boston, where they were burned under circumstances entailing no liability under Massachusetts law, the carrier was responsible purely because the contract of shipment was made in New York. *Faulkner v. Hart*, 82 N. Y. 413. The question in issue was simply one of delivery, and it seems difficult to maintain that what constitutes delivery in Boston may be determined by the law of New York. For a somewhat similar case *contra*, see *Curtis v. Del. L. & W. R. R. Co.*, 74 N. Y. 116. In all cases the preliminary question of the validity of the contract is to be determined by *lex loci contractus*. *Hale v. New Jersey, etc., Co.*, 15 Conn. 539. But granting its validity, the law of the place of performance, or of the event which gives rise to the action, must be applied.

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**DUTY OWED TO THE PUBLIC BY THE GUARDIAN OF A SMALLPOX PATIENT.** — As the law of torts develops, there is apparently a growing tendency to extend the limits of actionable negligence. As a necessary preliminary step to this extension, the courts are bound to find a broadening range of non-contractual legal duties. With the greater complexity of society and the increasing intercourse between its different and oftentimes widely separated parts, the existence of these duties is frequently assumed if not always logically accounted for. An illustration of this is found in a recent case in Texas which raises, on an interesting set of facts, the question as to the origin of a duty for the negligent breach of which the defendant must respond in damages. A railroad company had a contract with its employees whereby it agreed for a small monthly remuneration to care for them in case of illness. In performance of its contract the company negligently provided an incompetent attendant for a delirious smallpox patient. It was known to the defendant that persons thus afflicted would be likely to escape if care were not exercised. Owing to the attendant's negligently falling asleep, the patient escaped and infected the plaintiff. The defendant was held liable. *Missouri, etc., Ry. Co. v. Wood*, 68 S. W. Rep. 802.

Although the court, in arriving at this desirable conclusion, recognizes that the discovery of a legal duty is the pivotal point in the case, yet it does not make an analysis of the principles involved, or consciously attempt to lay down a new rule of law or to extend a recognized one. In most of the cases cited in the opinion the defendant had done some affirmative act such as bringing diseased animals in contact with those of the plaintiff, or taking an infected patient through the streets or to the plaintiff's house. Whereas in the principal case the defendant's negligence consisted not in doing a positive act, but in failing to keep the patient away from the plaintiff: an act of omission. *Dicta* favorable to this decision appear in *Henderson v. Dade Coal Co.*, 100 Ga. 568; and *Dean v. St. P., etc., Co.*, 41 Minn. 360. For contrary *dicta*, see *Sarson v. Roberts*, [1895] 2 Q. B. 395. Only one case has been found which appears to be precisely in point. There the defendant having control of a diseased animal was held liable for negligently failing to repair a partition separating his own from the plaintiff's animals, as a consequence of which the disease was communicated. *Mills v. N. Y., etc., Co.*, 2 Robt. 326; affirmed, 41 N. Y. 619. A further class of cases which in many respects may be thought analogous to the principal case is that in which the defendant negligently puts on the market a wrongly labelled



drug, and a remote vendee is allowed to recover for resulting damage. See *Thomas v. Winchester*, 6 N. Y. 397; 15 HARV. L. REV. 666. But there too the negligent act is positive.

The law is less ready to impose a duty to act than a duty not to act. A man is under no legal duty to save a stranger whom he sees drowning; but he is under a legal duty not to push him into the water. The defendant undoubtedly would owe a duty to all the individual members of the public not to take the patient through the streets or to their houses. If it is held that there exists the same broad duty actively to prevent his spreading the infection, the result is apparently an extension of the rules of tort liability to a new class of cases. It means that as the law grows it will recognize as a legal duty what formerly it has regarded as a moral duty only. If the case is to be supported on principles heretofore recognized, it must be on the ground that the defendant did certain acts prior to the time of the alleged negligence which imposed upon him the duty of care. When he voluntarily assumed control of this patient — this irresponsible force — he could foresee damage to some remote third person, or class of persons, as a natural and probable consequence of a failure by himself to use ordinary care in controlling it. Thereupon it may be said that a duty arose toward such persons to exercise this care. *Cf.* POLLOCK, TORTS, 2nd ed. 373-4.

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DETERMINATION OF STATUS OF FOREIGN TERRITORY. — Probably no court in this country would hold that the decision of the executive department of the government on a political question was not binding on the courts; yet what is a political question has never been strictly defined. A recent case before the United States Circuit Court raised a very nice question of this kind. An importer who had brought crude tartar from Algeria into this country claimed the right to pay duty on it at 5 per cent *ad valorem* under the terms of the reciprocity treaty between the United States and the Republic of France. The court found for the importer, holding that the question whether Algeria was a part of France was a judicial not a political one; and that in the determination of it the court would receive testimony of the French ambassador and other French officials concerning the law on the point. *Tartar Chemical Co. v. United States*, 116 Fed. Rep. 726 (Circ. Ct., S. D., N. Y.).

If there were a dispute between the United States and France concerning the possession of Algeria, clearly it would be a political question to be decided by the executive branch of the government, and the court would be bound to respect its decision. *Foster v. Neilson*, 2 Pet. (U. S. Sup. Ct.) 253. This the court would do even though on general principles of international law, apart from special decision by the political department, it would itself reach a different result. *In re Cooper*, 143 U. S. 472. Again, if there were disputes between France and another state concerning the ownership of Algeria, the court would be bound by the decision of the executive. *The Santissima Trinidad*, 7 Wheat. (U. S. Sup. Ct.) 337. If it were a question of the existence of Algeria as an independent power, the court would follow the ruling of the political department. *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. Furthermore, if it were a question which of two governments was the lawful government of Algeria, it would clearly be a political question, and the court would take notice of the ruling of the executive. *Luther v. Borden*, 7 How. (U. S. Sup. Ct.) 1. The reason for the rule that the

judiciary is bound by the decision of the executive department in political questions is clear. Contrary decisions by executive and judicial departments on questions involving the sovereignty or jurisdiction of states, or the status of government, would be a source of embarrassment, and might involve the state in international complications. One department must, then, decide such questions, and the executive department which has charge of the diplomatic relations of the state is obviously the proper one to do so.

The reason for the rule clearly shows it inapplicable to the principal case. No question of sovereignty or jurisdiction was raised. The United States did not dispute the jurisdiction of France in Algeria, nor did any other nation dispute it. The sole question at issue was whether, under the Treaty, goods from Algeria could be regarded as coming from France. It is apparent, then, that no question was raised the decision of which could in any way involve this country in international complications. The court had merely to interpret the meaning of the word "France" as used in the Treaty, and this under the circumstances was clearly a judicial question.

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THE NATURE OF BUSINESS GOODWILL. — A recent Indiana case raises the question whether the goodwill of a business is "property" within the terms of a statute which taxed "all property within the jurisdiction of the state not specially exempt," and decides it in the negative. *Hart v. Smith*, 64 N. E. Rep. 661. The court admitted that there is "an almost universal recognition at the present day of goodwill as in the nature of property." They regarded it as clear, however, "that goodwill is not in and of itself property, but that it is an incident that may be attached or in many cases connected with it." Since the decision is based on a misconception of an earlier case, it is fortunately of little authoritative value. The court in consequence of its error treated the goodwill of the business as attaching to the stock in trade, when the judge in the earlier case expressly said that it never could be so regarded. See *Kawson v. Pratt*, 91 Ind. 9, 16.

Lord Eldon's classic definition stated that goodwill was nothing more than the probability that old customers would resort to the old place. See *Cruttwell v. Lye*, 17 Ves. Jr. 334. And Leach, M. R., described it as "the advantage attaching to the possession of the house" in which the business had been carried on. *Chissum v. Dewes*, 5 Russ. 29. In accordance with this view goodwill was treated as "local," attaching to the possession of realty, and hence it was natural to regard it in a way as an incident to property. A broader definition now prevails. Briefly stated, goodwill is conceived to be the advantage possessed by an establishment in consequence of public patronage received from constant or habitual customers on account of its local position, or reputation for skill, affluence, punctuality, etc. See STORY, PARTNERSHIP, § 99. The patronage dependent upon reputation is secured to a firm or business house by its trade names or trade marks. Thus the goodwill of a public house, instead of being incident to the premises alone, attaches to the name by which they are known. See *Woodward v. Lazar*, 21 Cal. 448. The goodwill of a newspaper is annexed to the title under which the paper is published. *Boon v. Moss*, 70 N. Y. 465. And manufacturers find their goodwill dependent upon their trade marks. See *Edwards v. Dennis*, 30 Ch. D. 454. Further, the general tendency of the law under the broader definition is to treat goodwill as itself property. It is regarded as proper subject matter for a sale or bequest. *Howard v.*



*Taylor*, 90 Ala. 244; *Canham v. Jones*, 2 Ves. & B. 218. So, too, it has been held to be an asset of a partnership. *Cooke v. Collingridge*, 27 Beav. 456. It has also been designated as an asset available in the hands of a trustee in bankruptcy. 46 & 47 VICT. c. 52, § 56. And it has been considered as property within the terms of a statute regulating the issue of stock of a corporation. *Washburn v. National Wall-Paper Co.*, 81 Fed. Rep. 17.

The prevailing view seems correct. The sole reason for denying that goodwill is property lies in the fact that in so far as it is "local" it is assignable only in connection with the transference of realty. But though this fact be true as to the method of its transference in such cases, it does not follow that goodwill is not of itself property. On the other hand, it is recognized that goodwill is of great pecuniary value, and that it is in one way or another assignable. Hence it would seem that goodwill has the two essential attributes of property and must be treated as such.

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CONSTITUTIONALITY OF UNEQUAL TAX ASSESSMENT UPON REAL AND PERSONAL PROPERTY. — The problem of adjusting the burdens of government by a fair method of taxation is fast becoming one of the most formidable that confront the legislature and the judiciary. Many constitutions provide that "all taxation shall be equal and uniform"; and where such provision does not exist there is generally a statute of a similar tenor. The judicial interpretation of this form of legislation is of no little interest. Such laws do not mean that there shall be no special tax on a particular district for local improvements, nor that the method of valuation shall be the same for all sorts of property, nor that every tax-payer's burden shall be absolutely just. *Richmond v. Scott*, 48 Ind. 568; *State R. R. Tax Cases*, 92 U. S. 575; *Commonwealth v. Bank*, 5 Allen 428. But they do mean that there shall be no discrimination in estimating the value of property or in the rate of taxation against an individual or a corporation; no discrimination against a class, or against any species of property. See WELTY, ASSESSMENTS, § 186; *Bureau Co. v. C. B. & Q. R. R.*, 44 Ill. 229; *R. R. & Tel. Cos. v. Board*, 85 Fed. Rep. 302.

On the whole the courts have inclined towards a narrow rather than a broad construction. A good example of this policy appears in a recent decision of the New York Court of Appeals. A statute provided that "all real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value." An injunction was sought to restrain the collection of part of a tax on certain bank stock from the stockholders, on the ground that the real estate in the city of New York was deliberately assessed at only 60 per cent of its true value. In sustaining a demurrer the court admitted that the plaintiff's suit would properly come within equity's jurisdiction, since there was no adequate remedy at law. But it denied relief, influenced by the considerations that there was no inequality in the valuation of property of the same class, that the assessors presumably acted honestly, that absolute fairness is unattainable, that real estate cannot be hidden and is therefore at a disadvantage as compared with personalty, and that granting relief would upset the whole tax for a year long past. *Mercantile Nat. Bank v. Mayor, etc., of New York*, 172 N. Y. 35.

Admittedly the tax was in direct violation of a legislative mandate, yet the court would not interfere. If this plaintiff alone had had its burden thus illegally increased it would apparently have prevailed. See *Board of*

*Assessors v. Ala. C. R. R.*, 59 Ala. 551. If National Banks as a class had suffered they would have obtained relief. *Cummings v. Nat. Bank*, 101 U. S. 153. But because the class of sufferers, *i. e.*, all personal property holders, is so very large, they are without redress. The result certainly does not appear logical. Could a statute providing that all personalty shall be assessed at 100 per cent of its value and all realty at 60 per cent be passed without repealing by implication the section quoted above, or — had that section been in the Constitution — without being unconstitutional? Surely not. Yet, as the validity of an assessing law and the legality of an assessment must be tested by the same general principles, this decision would imply an affirmative answer to the question. Undoubtedly there are strong arguments in favor of the result reached. It is common knowledge that much personalty escapes taxation entirely, and that a decreased assessment upon realty does therefore approximate justice. But a system that lets honest personal property holders suffer, as this system does, cannot be the best. Approximate equality in taxation can be reached in other ways than by disregarding enacted laws. Let the legislatures, whose province it is, determine what laws will best attain justice, and let the courts enforce those laws unflinchingly. There are apparently no decisions contrary to the principal case; but for language opposed to it in spirit, see *Dundee v. Parrish*, 24 Fed. Rep. 197; *Bank v. Hines*, 3 Oh. St. 1; WELTY, ASSESSMENTS, § 185.

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**TORT CLAIMS AGAINST FOREIGN GOVERNMENTS.** — By the seventh article of the Treaty of Paris, December 10, 1898, the United States and Spain mutually relinquished all claims of citizens or subjects of the one country against the government of the other; and the United States undertook to adjudicate and settle all claims of its citizens against Spain. In pursuance of this undertaking, Congress by Act of March 2, 1901, constituted a commission to receive and examine the claims of citizens of the United States against Spain. Before this Commission, one McCann who had been a seaman aboard the United States Battleship *Maine* at the time she was destroyed in Havana Harbor, sued for damages for injuries received in the explosion. The commission dismissed the claim on the ground that the injury done by the destruction of the *Maine* was a national injury, and that therefore no individual seaman acquired any claim against Spain. *McCann v. United States*, Before Spanish Treaty Claims Commission [1902]. The jurisdiction of the commission extends only to claims of citizens of the United States against Spain which existed at the date of the Treaty of Paris. Any possible claim which the petitioner may have had against Spain must be based on one of two grounds: either that Spain intentionally caused the explosion, or that she negligently permitted it to happen.

The Battleship *Maine* was present in Havana Harbor on an official errand of the United States. If it be assumed that the *Maine* was intentionally destroyed by Spain, the act of Spain can have only one possible significance. Without resort to the fiction of extraterritoriality, it can unqualifiedly be held that an attack on a vessel representing the United States is equivalent to an invasion of United States territory. It is an attack on the dignity of the United States as a sovereign independent state, the international equal of the attacking power. Such an act is an act of war in its very nature; and that nature is not changed because reasons of policy urge

the offended nation to overlook it, and not to declare war. See *Mr. Webster to Mr. Crittenden*, WHART. INTERNAT. L. DIG., § 21. If this is true, it follows that the petitioner has no claim; for there is a well-settled rule of international law that no citizen or subject gains a right against a belligerent for damages sustained in war between that power and his sovereign. See WHART. INTERNAT. L. DIG., § 224. The case, however, cannot be disposed of on that ground, for there is no evidence in the report of the Board of Inquiry to sustain the assumption that the *Maine* was intentionally destroyed.

On the remaining possible assumption that the *Maine* was destroyed by reason of the negligence of Spain, a similar result would be reached, and on reasoning more nearly in accord with the actual facts. Clearly, if the ship were destroyed negligently, the injury could not be considered a national injury, that is to say, an affront to the dignity of the United States as a sovereign power. The United States would in that case have no greater claim, except by comity, than any steamship company would have if its vessel were destroyed under similar circumstances; and seamen aboard the *Maine* could have no greater rights than American seamen aboard a merchant vessel. According to the *dicta* of the commission they would have even fewer rights. But even assuming that they would have equal rights, it is well settled that they are entitled to no greater protection or rights than the citizens or subjects of the local power. *New Orleans Riot*, SNOW'S CASES ON INTERNAT. L. 181. A Spanish citizen would have no cause of action against his own government if injured by the negligent explosion of a submarine mine. For it will not be seriously controverted that the setting and maintaining of submarine mines are governmental acts; and, consequently, for their negligent performance Spain would not be liable in tort. *Levy v. City of New York*, 1 SANDF. (N. Y.) 465; *Belknap v. Schild*, 161 U. S. 10, 17. It follows, then, that the petitioner in the principal case having no greater rights than a Spanish subject, could gain no claim against Spain. A short ground for disposing of the case might have been taken. The naval Board of Inquiry reported that it was unable to obtain evidence "fixing the responsibility on any person or persons." Upon that finding, Spain was never liable, and no right ever arose in favor of the petitioner.

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## RECENT CASES.

**ADMINISTRATIVE LAW — RIGHT IN TORT AGAINST FOREIGN GOVERNMENT — BATTLESHIP MAINE CASES.** — By Act of Congress, March 2, 1901, the Spanish Treaty Claims Commission was established to adjudicate and settle claims of citizens of United States against Spain which had been relinquished to Spain by the seventh article of the Treaty of Paris, December 10, 1898. Before this commission a seaman injured in the destruction of the Battleship Maine brought a claim for damages. *Held*, that he cannot recover. *McCann v. United States*, Before the Spanish Treaty Claims Commission [1902]. See NOTES, p. 137.

**BANKRUPTCY — PRIORITY — CLAIMS FOR WAGES.** — The Federal Bankruptcy Act, § 64 *b*, gives priority to claims for wages earned within three months before the commencement of bankruptcy proceedings, not to exceed three hundred dollars in amount; and further, to all debts entitled to priority under the laws of the state. The claims in question were for wages not earned within three months before the commencement of the bankruptcy proceedings, but would be entitled to priority under New York

**Laws of 1897, c. 24, § 29.** *Held*, that they are entitled to priority under the Federal Act. *In re Slomka*, 28 N. Y. L. J. 189 (U. S. Dist. Ct., S. D., N. Y.).

On this point the decisions in the Circuit Court of Appeals are in conflict, and no case seems yet to have been carried to the Supreme Court. See *In re Rouse*, 91 Fed. Rep. 96; *In re Coe*, 109 Fed. Rep. 550. The question is whether the provisions in the Act regarding wages should be construed as excluding priority of all wage claims except as therein specifically provided, or merely as creating a protection for claims for wages not already protected by state laws. The phrase, "not to exceed three hundred dollars," would indicate strongly that claims beyond that amount are to be excluded; and it would seem that the entire clause was meant to be one of positive limitation, and, therefore, to exclude all claims for wages more than three months old. The claim in question being too old to fall within the particular clause as to claims for wages, the court admitted it under the more general class of debts entitled to priority by state law. It would seem, however, that an item excluded by a particular provision should not be regarded as within a more general provision which might otherwise include it. *State v. Trenton*, 38 N. J. Law, 64.

**BANKRUPTCY — PROVABLE CLAIM — EFFECT OF PART PAYMENT BY SURETY OF BANKRUPT.** — The plaintiff was the holder of a bankrupt's promissory note on which, before bankruptcy, the surety had made a part payment. *Held*, that the plaintiff can prove for the full amount of the note. *Swarts v. Fourth Nat. Bank*, 117 Fed. Rep. 1 (C. C. A., Eighth Circ.).

By a part payment on the principal obligation a surety acquires an immediate right of indemnity against the debtor, whose debt is diminished *pro tanto*. *Hull v. Hall*, 10 Humph. (Tenn.) 352. Nevertheless, under The Bankruptcy Act of 1867 as interpreted by the courts, a creditor who had received such part payment, was allowed to prove for his entire debt to the exclusion of any proof by the surety who had paid only in part. *In re Ellerhorst*, 8 Fed. Cas. 522. The principal case gives the same effect to § 57, *i*, of the present Act. However forced this construction of the statute may appear, the result seems unexceptionable. It is desirable that the creditor be assured of ultimate payment in full, and this result is more certain if the entire dividend from the bankrupt's estate on account of this debt is paid directly to the creditor without first swelling the assets of the surety. Moreover, the surety is not prejudiced by this procedure, for he is equitably entitled to any surplus received by the creditor, and is in the same position pecuniarily as he would be if allowed to prove independently for indemnity, and subsequently obliged to make good the principal's default. *In re Ellerhorst*, *supra*. See also *Swarts v. Siegel*, 117 Fed. Rep. 14; *In re Heyman*, 95 Fed. Rep. 800.

**CARRIERS — EJECTION OF PASSENGER PRESENTING WRONG TRANSFER CHECK.** — A passenger on a street car presented an invalid transfer, which he had received through the mistake of the company's agent, and on his refusal to pay fare, was ejected in accordance with the company's rule. *Held*, that the street car company is liable in damages for the ejection. *Lawshe v. Tacoma Ry. & P. Co.*, 70 Pac. Rep. 118 (Wash.).

This decision indicates the tendency of modern authorities. See *Jacobs v. Third Ave. R. R. Co.*, 75 N. Y. Supp. 679; *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124. In many jurisdictions, however, recovery in tort is denied, and the passenger's only remedy is for breach of the contract of carriage. *Bradshaw v. South B. R. R. Co.*, 135 Mass. 407. Adoption of one rule or the other must depend upon the view taken as to the reasonableness of the regulation that a passenger be ejected on failure to present a ticket or transfer valid on its face, and refusal to pay fare. In view of practical considerations, *e. g.*, the fraud to which the carrier will be exposed, if he must decide between receiving a questionable ticket and subjecting himself to possible tort liability, the requirement seems reasonable. With regard to railroad tickets, the view has been expressed, that a ticket is not mere evidence of the contract, but is the obligation itself, so that a passenger who presents a bad ticket has no right on the train, regardless of the reasonableness of the regulation concerning ejection. 1 HARV. L. REV. 17; 9 *ibid.* 353. But this theory is not supported by the decisions, and, whether tenable or not, is inapplicable to a street car transfer, which is in its very nature a voucher.

**CARRIERS — TICKETS — NOTICE OF LIMITATION UPON TIME FOR USE.** — The plaintiff, a passenger on defendant's train, presented a ticket, purchased two days before. In accordance with the company's rules, the conductor refused to accept the ticket, and ejected the plaintiff. Upon the trial the defendant offered in evidence a large placard, which had been posted at the waiting-room, stating that "All one-way tickets will be limited to the day of sale." *Held*, that in the absence of any evidence

to show that the plaintiff was aware of its contents, the placard is not admissible. *Georgia R. R. Co. v. Baldoni*, 42 S. E. Rep. 364 (Ga.).

It is well settled that by special contract a carrier may limit his common law obligations, provided the restriction is not one that contravenes public policy. See *Farmers', etc., Bank v. Champlain Trans. Co.*, 23 Vt. 186; *The Montana*, 22 Fed. Rep. 715. But it is not enough that knowledge is brought home to the shipper or passenger by a general notice; he must expressly assent to it as forming the basis of the contract. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251. On this latter ground a passenger has been held bound by stipulations contained in a ticket signed by himself, or sold at a reduced rate. *Daniels v. Florida, etc., R. R. Co.*, 39 S. E. Rep. 762 (S. C.); *Pennington v. Phila., etc., R. R. Co.*, 62 Md. 95. In another class of cases, where no special contract is made, regulations detailing the terms on which the carrier will enter into relations with the public are enforced, provided they are reasonable and the plaintiff has actual notice of them. *Boyd v. Spencer*, 103 Ga. 828. The principal case seems fairly within this class; but, apart from any question of reasonableness, the failure to fix notice upon the plaintiff is decisive against the carrier. In fact the same result has been reached where the stipulation relied on was contained in a general notice and also printed on the ticket. *Louisville, etc., R. R. Co. v. Turner*, 100 Tenn. 213.

**CONFLICT OF LAWS—CONCURRENT JURISDICTION OF FEDERAL AND STATE COURTS—NULLIFICATION OF A WILL IN EQUITY.**—A bill in equity to set aside a nuncupative will which had been admitted to probate was brought in a United States court, by alien heirs, against an administrator appointed by a state court. *Held*, that the plaintiffs have a constitutional right to sue in the United States court. *O'Callaghan v. O'Brien*, 116 Fed. Rep. 934 (Circ. Ct., N. D. Wash.).

There is much confusion as to how far a decedent's estate in the hands of an administrator can be reached by process from a United States court. The rule that property of which a state court has taken jurisdiction, is thereby removed from the concurrent jurisdiction of a United States court, does not necessarily apply to an estate in the hands of an administrator, for it has been held that an administrator is not an officer of the court, within the meaning of the rule that an officer of a court cannot be sued elsewhere without the consent of that court. *Byers v. McAuley*, 149 U. S. 608. But it seems well settled that, since in a decision as to the validity of a will there is involved something like a decree *in rem* for which the machinery of a probate court is peculiarly adapted, a circuit court of equity will not take jurisdiction of a suit to annul a will. *Broderick's Will*, 21 Wall. (U. S. Sup. Ct.) 503. While, therefore, the jurisdiction of the court in the principal case may not be open to objection under the former rule, the decision seems clearly opposed to the latter.

**CONFLICT OF LAWS—CONTRACTS LIMITING CARRIER'S LIABILITY.**—A horse was shipped from New York into Pennsylvania, where it was injured by the negligence of the carrier. As a defense to a suit for damages, brought in the latter state, the defendant set up a contract made in New York limiting his liability to \$100. *Held*, that the contract, though valid in New York, is no defense in Pennsylvania. *Hughes v. Pennsylvania R. R.*, 51 Atl. Rep. 990 (Pa.). See NOTES, p. 132.

**CONFLICT OF LAWS—JURISDICTION OF TORT ON HIGH SEAS—FICTION OF EXTRATERRITORIALITY.**—A steerage passenger on board an ocean steamship registered in and sailing from the port of New York was, on the high seas, swept overboard, through the negligence of the company, and drowned. Her administrator sues in the United States Circuit Court for New York. *Held*, that the court has jurisdiction, for the court will construe the territory of New York as covering the vessel while on the high seas. *Lindstrom v. International Navigation Co.*, 117 Fed. Rep. 170 (Cir. Ct., S. D. N. Y.). For a discussion of the questions involved, see 15 HARV. L. REV. 408; *ibid.* 411.

**CONFLICT OF LAWS—VALIDITY OF FOREIGN MARRIAGE—STATUTE RESTRICTING MARRIAGE AFTER DIVORCE.**—A California statute declared void marriage by a divorced person within one year after the decree of divorce, if the former spouse were living. The plaintiff, a woman domiciled in California, was divorced and within a year married again in Nevada, the second husband being also domiciled in California. Upon the latter's death, his estate was administered. *Held*, that the divorce was complete at the time of the decree, that the statute has no extraterritorial operation, and hence that the marriage is valid and the wife entitled to family allowance. *In re Wood's Estate*, 69 Pac. Rep. 900 (Cal.).

The same plaintiff made an ante-nuptial contract with her second husband by which,



in consideration of marriage and of relinquishment by her of all claims on his property, he promised to pay her \$10,000. *Held*, that the marriage, though valid, is contrary to the policy of the California statute, and is not good consideration to support the promise. *Wood v. Wood's Estate et al.*, 69 Pac. Rep. 981 (Cal.).

The California statute would seem designed to discourage divorce by rendering immediate re-marriage impossible. Such a statute should be distinguished from those which declare parties to a divorce incapable of re-marriage during the period allowed for appeal. The latter acts prevent the decree from effecting a complete separation until that period has expired, the object being to preserve the original marriage so far as necessary to preclude a new one before the first has been finally dissolved. *In re Smith's Estate*, 4 Wash. 702; *McLennan v. McLennan*, 31 Oreg. 480. *Cf. Conn v. Conn*, 2 Kan. App. 419. In view, therefore, of the apparent purposes of the two classes of statutes, the decision in the first case that a complete separation was immediately effected by the decree seems sound. That the validity of marriage depends on the *lex loci contractus*, not on the *lex domicilii*, seems now well settled and is established by statute in California. *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Kent v. Burgess*, 11 Sim. 361; CAL. CIV. CODE, § 63. See BISHOP, MAR. DIV. AND SEP., § 843. It is a proper corollary of this doctrine that the statute in the principal case has no extra-territorial operation without words expressly giving it. *Van Voorhis v. Brintnall, supra*. See BISHOP, MAR. DIV. AND SEP., § 869. But the distinction made by the second decision seems hardly tenable. In both cases the plaintiff's claims depend directly on the validity of the marriage, the distinction being merely that the first claim arises by operation of law, the second from express contract of the parties. It would seem, however, that this is not a sufficient reason for distinguishing the cases, and that a decision that this marriage, admittedly valid, is incapable of giving rise to the legal rights which can be founded upon other valid marriages, is doubtful on grounds of policy if not on those of sound logic.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CONCLUSIVE EVIDENCE.** — A statute provides that in any action brought against a railroad company for failure to deliver grain shipped over its line, the bill of lading shall be conclusive proof of the amount received. *Held*, that the statute is unconstitutional as contravening the provision insuring due process of law. *Missouri, K. & T. Ry. Co. v. Simonson*, 68 Pac. Rep. 653 (Kan.).

Though the rules of evidence are in general a proper subject for statutory control, it is not within the power of the legislature to enact laws which altogether preclude a party from exhibiting his rights. Consequently, statutes declaring that the presentation of certain evidence shall constitute conclusive proof of a specified fact are generally held unconstitutional, as in the case under discussion. COOLEY, CONST. LIM., 5th ed., 453; *Cairo & F. R. R. Co. v. Parks*, 32 Ark. 131; *Wantlass v. White*, 19 Ind. 470. But, as pointed out in the strong dissenting opinion, no decision has denied the power of the legislature to give conclusive effect, as against a party, to his deliberate statement, made under the admonition of the statute. Where the basis of the conclusive presumption is a declaration of this nature, and where there is a justification in policy for such legislation, as in the case of the railroad receipts to which the statute in question relates, there seems to be no room for the constitutional objection. *Orient Ins. Co. v. Daggs*, 172 U. S. 557.

**CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — VESTED RIGHT IN THE DEFENSE OF STATUTE OF LIMITATIONS.** — A statute imposed a limit of one year on claims against a railroad for damage caused by a change of grade. Shortly after the expiration of the year the legislature extended the period. *Held*, that this act is constitutional, and under it claims previously barred can be prosecuted. *Dunbar v. Boston & P. R. Co.*, 63 N. E. Rep. 916 (Mass.). See NOTES, p. 129.

**CONTRACTS — TRANSFER OF BONDS — IMPLIED COLLATERAL AGREEMENT PASSING TO ASSIGNEE.** — A contractor was entitled by his contract with the defendant railroad company to the proceeds of all stock issued, and to all stock remaining unissued when the road was completed. The company issued stock certificates to a county and took in payment bonds of the county payable to the bearer. These bonds were given to the contractor as proceeds of the sale of stock and were sold by him to the complainants. The transaction between the county and railroad company was adjudged void, and the bonds and stock certificates cancelled. *Held*, that the complainants are entitled to a decree requiring the defendant to issue the stock to them. *Citizens, etc., Assn. v. Belleville, etc., Ry. Co.*, 117 Fed. Rep. 109 (C. C. A., Seventh Circ.).

Where a town issued bonds to a railroad in discharge of a contractual obligation, and the railroad sold them to the complainant, it was held that the latter, on the bonds

being declared void, was not subrogated to the railroad's rights under its contract. *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534. The court distinguishes the principal case on the ground that the company delivered the bonds to the contractor under an implied agreement that if the bonds proved void, it would issue to him the stock of whose sale the bonds were proceeds, and that this promise attached itself to the bonds in such a manner that it passed with them to all subsequent vendees. This construction of the contract seems untenable, for since the transaction between the county and the company was void, the stock remained unissued, and the contractor was entitled to it by his express contract. If the complainant has any remedy it would seem to be against his vendor on an implied warranty of the validity of the bonds. But in a similar case, the court refused to imply a warranty. *Otis v. Cullum*, 92 U. S. 447.

**CRIMINAL LAW — CONSPIRACY — ACQUITTAL OF ALL BUT ONE DEFENDANT.** — Three defendants were jointly arraigned on a charge of conspiracy. One of them pleaded guilty and the two others were acquitted on pleas of not guilty. Held, that the judgment passed against the one who pleaded guilty must be vacated. *The King v. Plummer*, [1902] 2 K. B. 339.

This rule was tacitly assumed by the early English decisions and has been expressly recognized by the later ones. *Rex v. Rinnerley*, 1 Str. 193; *Rex v. Cooke*, 5 B. & C. 538; *Reg. v. Manning*, 12 Q. B. D. 241; *Reg. v. Thompson*, 16 Q. B. 832. Indiana and North Carolina have adopted it as to indictments for adultery and fornication. *Turpin v. State*, 4 Blackf. (Ind.) 72; *State v. Mainor*, 6 Ired. (N. C.) 340; *State v. Rinehart*, 106 N. C. 787. Texas and Tennessee repudiate it. *Alonso v. State*, 15 Tex. App. 378; *State v. Caldwell*, 8 Baxt. (Tenn.) 576. The view of the last two jurisdictions seems more in accord with reason. To support the doctrine, the sole reason given is that, since these offenses are necessarily joint ones, two verdicts of guilty and not guilty would be mutually repugnant. This reasoning does not rightly apply to cases of adultery, for there one of the defendants might be a party to the joint act without having the criminal intent necessary to constitute the crime; for example, when he acted under a *bona fide* mistake of fact. And even in cases of conspiracy the repugnancy on the record is more apparent than real — since the verdict of not guilty for the first defendant amounts to little more than not proved — and is far outweighed by the repugnancy between the second defendant's acquittal, and facts clearly proving his guilt.

**CRIMINAL LAW — DOUBLE JEOPARDY — FORMER TRIAL FOR LESSER CRIME.** — Held, that a conviction for assault and battery is a bar to a subsequent prosecution for assault with intent to kill. *People v. McDaniels*, 69 Pac. Rep. 1006 (Cal.).

The better view and the weight of authority are to the effect that conviction for a lesser crime is a bar to prosecution for the greater crime of which the lesser is a constituent part. *Reg. v. Elrington*, 9 Cox C. C. 86; *Moore v. State*, 71 Ala. 307. See *contra*, *State v. Hallabough*, 66 Ind. 223. It is clear that a conviction or acquittal of the larger charge should bar a prosecution for the smaller, since generally by statute a defendant can be convicted on any indictment of a lesser crime necessarily included within the indictment. The objection of double jeopardy is equally strong to bar a subsequent prosecution for the higher offense after trial for the lower. As authority against the above view, some cases have been cited to the effect that conviction for assault is no bar to prosecution for homicide after the victim's death. *Reg. v. Morris*, 10 Cox C. C. 480; *State v. Littlefield*, 70 Me. 452; *Johnson v. State*, 19 Tex. App. 453; *Stewart's Case*, 5 Irv. 310 (Scotch). These cases, however, have generally recognized the rule, as here stated, while declaring it inapplicable when the greater crime does not exist at the time of the first prosecution.

**DAMAGES — AVOIDABLE CONSEQUENCES — BREACH OF CONTRACT OF SALE.** — The vendor in a contract for the sale of coal had agreed to give sixty days credit. At the time fixed for delivery, he broke his contract by refusing credit, but subsequently offered the coal to the vendee at a cash price less than the market price. Held, that the subsequent offer cannot be shown in mitigation of damages. *Coxe v. Anoka, etc., Co.*, 91 N. W. Rep. 265 (Minn.).

The general rule is that for the breach of a contract of sale the vendee can recover only the additional cost of securing the goods elsewhere, and compensation for any incidental injury suffered. *Gainsford v. Carroll*, 2 B. & C. 624; *Benton v. Fay*, 64 Ill. 417. It is held that an employer who has broken a contract for services is allowed to show in reduction of damages that he subsequently offered the servant re-employment, unless the offer was made on the condition that on its acceptance the breach should be waived. *Bigelow v. Am. Firestone Powder Mfg. Co.*, 39 Hun (N. Y.) 599; *Whitmarsh v. Littlefield*, 46 Hun (N. Y.) 418. Losses which follow a breach of a contract of sale,



but which would have been averted had the vendee availed himself of reasonable opportunities to purchase elsewhere, would not seem to be consequences of the breach, but of the vendee's carelessness. See *Beymer v. McBride*, 37 Ia. 114. The fact that it is the defaulting vendor who offers the opportunity should not vary the case; the vendee may, if he chooses, reject the offer, but if he does so, he cannot charge the vendor with losses which he would not have incurred had he accepted it. *Parsons v. Sutton*, 66 N. Y. 92; *Lawrence v. Porter*, 63 Fed. Rep. 62.

**DECEIT — FALSE STATEMENT OF CONSIDERATION IN A DEED.** — The plaintiff declared that she had bought certain notes secured by property deeded to a trust company; that a consideration was stated in the conveyance which grossly misrepresented the value of the property, and this was done by the defendant for the purpose of cheating and defrauding the plaintiff and others; that she had relied on the statement in buying the notes, and that the notes are worthless. The defendant demurred. *Held*, that the statement of value in the deed having been made, as alleged, in pursuance of a scheme to defraud, the declaration states a cause of action. *Leonard v. Springer*, 197 Ill. 532, reversing the same case below, in 98 Ill. App. 530. For a discussion of the decision in the lower court, see 15 HARV. L. REV. 576.

**EQUITY — SPECIFIC PERFORMANCE — MISTAKE AS A DEFENSE.** — The defendant at an auction sale purchased the plaintiff's land, mistaking it, because of deafness, for another parcel of land. The contract price was not exorbitant for the parcel actually bought. *Held*, that equity will compel specific performance of the defendant's contract. *Van Praagh v. Everidge*, [1902] 2 Ch. 266.

At law, it is no defense to an action on a contract that the defendant misunderstood the terms of the plaintiff's offer. The parties are bound by a reasonable construction of their expressed intention. See *Preston v. Luck*, 27 Ch. D. 497; *Rowland v. N. Y., N. H., & H. R. R.*, 61 Conn. 103, *contra*. Courts of equity, however, although admitting the existence of a contract, refuse in some instances to apply their extraordinary remedy of specific performance against a defendant who has contracted solely through a mistake, even though the mistake was not induced by the plaintiff. *Mansfield v. Sherman*, 81 Me. 365. The principle underlying the cases seems to be that equity will not enforce a contract when it would be inequitable to do so. If, however, the mistake is unreasonable or occasioned by the defendant's negligence, it is not allowed as a defense unless specific performance would occasion "hardship amounting to injustice." *Tamplin v. James*, 15 Ch. D. 215. In the principal case the defendant seems clearly to have been negligent. Moreover, the price paid was not exorbitant, and no hardship on that score would result. It is probably true that it is something of a hardship to compel him to take land that he had not intended to buy; but, on the whole, the case seems to be a proper one for specific performance.

**ESTOPPEL — FAILURE TO ASSERT A RIGHT.** — The plaintiff, having discovered that her signature had been forged to a release of dower in a deed of land made by her husband, neglected to notify the grantee. The defendant, who had no notice of the fraud, purchased the land from the grantee without the plaintiff's knowledge. *Held*, that the plaintiff is not estopped to claim her dower. *Hunt v. Reilly*, 52 Atl. Rep. 681 (R. I.).

The court regards it as decisive that the plaintiff had no knowledge of the defendant's intended purchase. Yet, where there is an actual misstatement, if it is one addressed to the public, knowledge that any particular person is about to act upon it is immaterial. *Richardson v. Silvester*, L. R. 9 Q. B. 34. By analogy it would seem that the plaintiff, having left uncontradicted before the public a misrepresentation likely to be acted upon at any time, should be estopped to set up the truth against one who has been misled. The court also relied largely upon a case in which a failure to give notice of a recorded mortgage was held not to raise an estoppel. *Viele v. Judson*, 82 N. Y. 32. It is true that when, as in that case, one's right is a matter of record, there is no duty to make it known, and hence no fraud in silence. *Kingman v. Graham*, 51 Wis. 232. But in the principal case it was the fraudulent title, and not the true one, that appeared on the record, and therefore the case relied on seems not to support the decision.

**EVIDENCE — HEARSAY — SUPPLEMENTING TESTIMONY BY CONTEMPORANEOUS MEMORANDA.** — To impeach the defendant as a witness in his own behalf, the prosecution offered his evidence given through an interpreter at the preliminary examination. For this purpose, the interpreter testified that he had accurately repeated in English the defendant's statements, and the official stenographer testified that he had reported

the interpreter's translation *verbatim*. *Held*, that the stenographer's report is hearsay and the admission of it was error. *People v. John*, 69 Pac. Rep. 1063 (Cal.).

Though the stenographer's notes may serve as a report of the testimony of a witness who testifies through an interpreter, they are obviously hearsay when the precise language of the witness is the subject of proof. *People v. Ah Yute*, 56 Cal. 119; *cf.* 15 HARV. L. REV. 859. But when, as in the principal case, the interpreter is also on the stand under oath and subject to cross-examination the hearsay rule ought not to apply. See THAYER, PREL. TREAT., EV. 501. The notes, however, can be used, if at all, not as independent evidence, but merely to supplement the interpreter's testimony. The rule on this point ordinarily is that when, as is probable in the principal case, a witness has no independent recollection, he may aid his testimony by his own contemporaneous memorandum or by that of another verified by him when made. See *Acklen's Executor v. Hickman*, 63 Ala. 494. Obviously the stenographer's notes are not within this rule. However, as all the parties to the transaction are before the court and under oath, the accuracy of the notes can be practically assured. This being true, it would seem wise to extend the rule so as to permit the use of such a memorandum as this. The step has, indeed, been taken in some jurisdictions. *Cf.* *Mayor, etc., of N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572; 1 GREENL. EV., 16th ed., § 439 b.

**EVIDENCE — SUBSEQUENT DECLARATIONS OF INTENTION.** — In a criminal prosecution for assault, after prior threats by the accused had been proved and other circumstantial evidence had been introduced, a declaration made by the accused eight or ten days after the alleged assault, to the effect that he would kill the assaulted person, was offered in evidence. *Held*, that the subsequent declaration was properly admitted as evidence of the existence of a guilty intent in the mind of the accused at the time of the crime. *Jones v. State*, 32 So. Rep. 793 (Fla.).

It is the modern doctrine that a prior declaration of intention is admissible to prove the commission of the act to which the declaration relates, if sufficiently close in point of time. *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285. This is because declarations are competent evidence of a material mental state, and the existence of an intention to do an act is material as showing that it was ultimately done. By reasoning that the existence of a state of mind at the time a declaration is made tends to show its existence at an earlier time, it has been said that a declaration of belief or intention made subsequent to the alleged act is similarly admissible. GREENL. EV., 16th ed., § 162 c. But such a declaration is of so slight probative value and so likely to receive undue weight, that its admissibility may well be questioned. This appears to be the better view as to post-testamentary statements, the most common example of declarations of a subsequent mental state. See 15 HARV. L. REV. 149. But so far as the declaration in question is concerned, it seems to have been properly admitted as confirming the inference from the prior threat that the act was done, by showing that the vicious intent continued. Here the objections suggested above have no place.

**INTERNATIONAL LAW — STATUS OF DEPENDENCY OF FOREIGN STATE — JUDICIAL QUESTION.** — By a treaty with France, tartar was dutiable at 5 per cent *ad valorem*. An importer of tartar from Algeria claimed the benefit of that provision. The United States contended that Algeria was not a part of France. *Held*, that it is a judicial question, and the court will receive evidence of the French law. *Tartar Chemical Co. v. United States*, 116 Fed. Rep. 726 (Circ. Ct., S. D., N. Y.). See NOTES, p. 134.

**JUDGMENTS — PASSING TITLE BY JUDGMENT IN TROVER — RES JUDICATA.** — The plaintiff having obtained a judgment in trover against the defendant for the value of a chattel, which judgment remained unsatisfied, subsequently brought replevin against the defendant to recover the chattel. *Held*, that the plaintiff is barred by the previous judgment against him, and the property in the chattel is now vested in the defendant. *Singer, etc., Co. v. Yaduskie*, 59 Leg. Intell. 367, 11 Pa. Dist. Ct. Rep. 571. See NOTES, p. 131.

**JUDGMENTS — RES JUDICATA — IDENTITY OF PARTIES AND SUBJECT MATTER.** — The plaintiff was the driver of a wagon which was injured by collision with the defendant's car. He was also a member of the firm which in a prior action had obtained a verdict for the injury to the wagon, thus establishing the defendant's negligence and the exercise of due care by the plaintiff in relation to the wagon. The plaintiff brought the present action for personal injuries sustained in the collision. *Held*, that the verdict in the former action is conclusive in regard to the questions of the defendant's

negligence and the plaintiff's contributory negligence. *Cahnmann v. Metropolitan St. Ry. Co.*, 37 N. Y. Misc. 475 (Sup. Ct., App. Term).

Since a partnership is not a legal entity, all actions are brought by or against the several partners jointly. *Metal Stamping Co. v. Crandall*, 17 Fed. Cas. No. 9,493 c. Consequently the plaintiff was a party to the prior action; and the fact that he was but one of several joint plaintiffs would not permit him to relitigate the matters there decided. *Wilson v. Buell*, 117 Ind. 315. But to render matter *res judicata* it is requisite that the subject matter of the prior and present actions should be identical. *Benz v. Hines*, 3 Kan. 390, 397; *Palmer v. Hussey*, 87 N. Y. 303. This was not the fact here, the subject matter being respectively injury to property and injury to the person. Moreover, the plaintiff could not have recovered in that action for injuries in which he alone had an interest. *Gray v. Rothschild*, 48 Hun (N. Y.) 596; *Rhoads v. Booth*, 14 Ia. 575. Since, therefore, the prior verdict did not conclude the plaintiff as regards his personal injuries, the doctrine of mutuality should prevent him from claiming its benefits. See *Goodnow v. Litchfield*, 63 Ia. 275. Nor was the question of the plaintiff's contributory negligence in relation to himself necessarily settled by the prior action, since it is conceivable that by jumping the plaintiff could have avoided personal injury even after the collision and damage to the wagon had become inevitable. There seems to be no authority directly in point.

**PROCEDURE — SERVICE ON CORPORATION — OFFICER OF FOREIGN CORPORATION WITHIN STATE.** — The code of North Carolina allows service of summons on a foreign corporation when it can be made in the state on the president of the corporation. CIV. CODE, § 217, subsec. 1. *Held*, that service on the president of a foreign corporation while in the state is sufficient to give the state court jurisdiction, although the corporation was doing no business in the state. *Jester v. Baltimore, etc., Co.*, 42 S. E. Rep. 447 (N. C.).

Statutory provisions similar to that in the principal case are not uncommon; and it is generally held that judgments rendered on such statutory service are valid for every purpose within the State. *Pope v. Terre Haute, etc., Co.*, 87 N. Y. 137; *Col. Iron Works v. Sierra Grande M. Co.*, 15 Col. 499. When, however, the statute does not expressly mention foreign corporations, some courts hold it applicable to domestic corporations only. *Newell v. Great Western Ry. Co.*, 19 Mich. 336. There can be no doubt that a state legislature has power to determine what shall be sufficient service to support judgments of the state courts within the state. Service by publication affords an example of the exercise of this power. *Mason v. Messenger*, 17 Ia. 261. But a judgment obtained on constructive service such as this will not be recognized in other states. *Latimer v. Union P. Ry. Co.*, 43 Mo. 105. Nor will such service be considered sufficient in event of the case being removed to the Federal courts. *Goldey v. Morning News*, 156 U. S. 518. It would seem, therefore, that the defendant corporation might have put in a special appearance, removed the case to the Federal court on the ground of diversity of citizenship, and there obtained a dismissal because of the insufficiency of the service. See *Goldey v. Morning News*, *supra*.

**PROPERTY — FIXTURES — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL.** — Premises were let to a firm for a certain term. Before its expiration one partner retired and the landlord cancelled the lease, giving the other partner a lease for the remainder of the term identical except for a power of assignment in the lessee. *Held*, that it is not such a new leasing as will prevent the tenant from removing trade fixtures previously erected. *Baker v. McClurg*, 64 N. E. Rep. 701 (Ill.). For a discussion of the question involved, see 15 HARV. L. REV. 853.

**PROPERTY — NATURE OF GOODWILL.** — An Indiana statute taxed "all property within the jurisdiction of the state, not specially exempt." *Held*, that the goodwill of a newspaper is not "property" within the act. *Hart v. Smith*, 64 N. E. Rep. 661 (Ind., Sup. Ct.). See NOTES, p. 135.

**PROPERTY — NUISANCE — RECOVERY BY LESSEE.** — A lessee took property, knowing that it was affected by a private nuisance. *Held*, that the lessee can recover the depreciation in the rental value. *Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 1, reversing the judgment in 54 N. Y. App. Div. 427. For a discussion of the decision in the lower court, see 14 HARV. L. REV. 547.

**PROPERTY — WATERCOURSES — RIGHTS OF NON-RIPARIAN OWNERS.** — The plaintiffs, neither owning nor leasing any land abutting on a river, leased from a power company the right to draw water from the power-canals which it had dug above its dam upon the river. A city higher up the stream was impliedly authorized by statute to

drain its sewage into the stream. *Held*, that the plaintiffs can recover in an action against the city for pollution of the water. *Doremus v. City of Paterson*, 52 Atl. Rep. 1107 (N. J.).

In England a riparian owner cannot assign his water-rights as against upper or lower proprietors, but can create only a contract right against himself. *Stockport Waterworks Co v. Potter*, 3 H. & C. 300; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155. The English decisions have been expressly followed in *Gould v. Eaton*, 117 Cal. 539. But other American cases seem somewhat to discredit the doctrine. See *Hall v. City of Ionia*, 38 Mich. 493; *Gillis v. Chase*, 67 N. H. 161; *St. Anthony Falls Co. v. Minneapolis*, 41 Minn. 270. The principal case was complicated by a question of eminent domain. Even if the plaintiffs had merely a contract right against the power company, such right was property which ought not to have been taken for public use without just compensation. See LEWIS, EMINENT DOMAIN, § 263, and cases cited. It would seem, therefore, that the case is sound. But, aside from distinctions of this nature, it seems that the English rule should be followed. The natural rights which are an incident of riparian ownership are in the nature of easements, strictly appurtenant to the riparian land. Few principles are more firmly established than that the owner of a dominant tenement cannot assign in gross an easement appurtenant to it. *Akroyd v. Smith*, 10 C. B. 164.

**RAILROADS—MAINTENANCE OF CROSSING—STREET RAILWAY CROSSING RAILROAD IN STREET.**—A steam railroad had tracks in a public street. A street railway constructed a line across it in an intersecting street. *Held*, that the steam railroad is entitled to an injunction restraining the street railway from running cars over the crossing until it has agreed to pay the expenses of maintaining the crossing. *Central Pass. Ry. Co. v. Philadelphia W. & B. R. Co.*, 52 Atl. Rep. 752 (R. I.).

A railroad which is owner in fee of its right of way is allowed compensation for the injury to its property and business resulting from the crossing of its tracks by a new line, and the burden of maintaining the crossing is also placed on the new line. *Lake Shore, etc., Ry. v. Chicago, etc., R. R.*, 100 Ill. 21. But where the tracks of the railroad are laid in the street, the company's right is subject to the public easement of travel, and since a street railway is generally held to be an instrument through which the public exercises this right, a railroad is not allowed compensation for resulting inconvenience to its business when its tracks in the street are crossed by a street railway. *Buffalo, etc., R. R. v. New York, etc., R. R.*, 72 Hun (N. Y.) 587; *Chicago B. & Q. R. R. v. West Chicago St. Ry.*, 156 Ill. 255. In making alterations in the rails and roadbed of the railroad, the street railway is, however, exercising a privilege which is not given to the general public, and the holding of the principal case that the expense of maintaining these alterations must be borne by the street railway, seems unassailable. No other decision upon the precise point has been found.

**STATUTE OF FRAUDS—PROMISES PARTLY WITHIN AND PARTLY WITHOUT THE STATUTE.**—The plaintiff conveyed mortgaged premises to the defendant as security for a loan. The defendant agreed orally to pay the interest on the mortgage and to reconvey the premises upon payment of the loan. Upon the defendant's subsequent refusal to reconvey, the plaintiff obtained a decree for reconveyance and then instituted this suit for breach of the agreement to pay the interest. *Held*, that the Statute of Frauds is a defense, since the contract is indivisible and the reconveyance was not voluntary. *Bradford v. McQuestion*, 64 N. E. Rep. 688 (Mass.).

Generally, where a promise partly within and partly without the Statute of Frauds is indivisible, the statute is a good defense to an action on the part without the statute. *Thayer v. Rock*, 13 Wend. (N. Y.) 53. The reason sometimes assigned is that to allow the action would have a direct tendency to compel performance of the part within the statute. See *Wetherbee v. Potter*, 99 Mass. 354, 361. But after a voluntary performance of the part of the promise within the statute, this reason fails, and an action upon the part without the statute is properly permitted. *Page v. Monks*, 5 Gray (Mass.) 492. The reason fails equally when the performance is involuntary, as in the principal case. If the decision is to be supported, therefore, a different theory must be adopted, and the cases allowing an action on the part of the promise without the statute after voluntary performance of the part within must be made to rest upon the ground that the promisor has waived his defense by the voluntary performance. Of course an involuntary performance cannot be regarded as a waiver.

**TAXATION—PROVISIONS FOR EQUALITY AND UNIFORMITY.**—A statute provided that "all real and personal estate liable to taxation shall be estimated and assessed . . . at its full and true value." An injunction was prayed to restrain the collection from

the shareholders of part of a tax on certain stock, on the ground that it was assessed at its full value, whereas the realty of New York was deliberately assessed at only 60 per cent of its full value. The defendant demurred. *Held*, that it is not a case for equitable interference. *Mercantile Nat. Bank v. Mayor, etc.*, 172 N. Y. 35. See NOTES, p. 136.

**TORTS — LIABILITY OF CUSTODIAN FOR ESCAPE OF SMALLPOX PATIENT.** — A railroad company in performance of a contract with its employees to care for them while sick, negligently provided an incompetent attendant for a delirious smallpox patient. The patient escaped and infected the plaintiff. *Held*, that the company is liable. *Missouri, etc. Ry. Co. v. Wood*, 68 S. W. Rep. 802 (Tex., Civ. App.). See NOTES, p. 133.

**TORTS — LIABILITY FOR EXPLOSIVES — INTERVENTION OF WILLFUL ACT OF THIRD PARTY.** — The defendant kept five thousand pounds of gunpowder stored in a populous neighborhood. This powder was maliciously exploded by an employee, and the plaintiff's house near by was damaged. *Held*, that, under the circumstances, keeping the powder was a nuisance, and the defendant is liable absolutely. *Kleebaner v. Western Fuse and Explosives Co.*, 69 Pac. Rep. 246 (Cal.).

That one who keeps large quantities of explosives in a populous neighborhood is guilty of creating a nuisance, and is liable for all damage resulting, irrespective of negligence, seems to be well-settled law. *Heeg v. Licht*, 80 N. Y. 579; *McAndrews v. Colterd*, 42 N. J. Law 189. And it is held that the liability is none the less although the explosion was caused by lightning. *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; *Prussak v. Hutton*, 30 N. Y. App. Div. 66. It therefore seems not a very long step to the decision in the principal case which, on the precise facts, seems to be one of first impression. Large stores of explosives in inhabited neighborhoods are so extremely hazardous that it is reasonable to impose this absolute liability although the nuisance *per se* may be only a small or remote part of the cause of the damage. Explosion cases must be distinguished from cases like *Rylands v. Fletcher*, L. R. 3 H. L. 330. In that class of cases the danger arises from an agency less likely to do damage, and is not so extreme as to create a nuisance. In such cases the intervention of a third party is held to exempt the defendant from liability. *Box v. Jubb*, L. R. 4 Ex. D. 76.

**TORTS — LOOK AND LISTEN RULE — STREET RAILWAYS.** — The plaintiff drove onto the tracks of an electric street railway at a crossing, and was struck by a car which he had not seen, but might have seen in time to avoid the accident had he looked. *Held*, that the rule requiring a man to look before crossing a railroad is applicable to an electric railway. *Beerman v. Union Ry. Co.*, 52 Atl. Rep. 1090 (R. I.). For a discussion of the question involved, see 14 HARV. L. REV. 234.

**TORTS — SLANDER — PROOF OF MALICE — REPETITION OF SLANDER AFTER COMMENCEMENT OF SUIT.** — After the commencement of an action for slander, the defendant repeated the slander to another person. *Held*, that evidence of the latter slander is not admissible to show the malicious character of the former, since it is in itself the ground for another action. *Swindell v. Harper*, 41 S. E. Rep. 117 (W. Va.).

Malice, like motive, may be proved, if material, by evidence of other reasonably proximate acts or declarations of the defendant. *Thurston v. Wright*, 77 Mich. 96, 101; *Williams v. Miner*, 18 Conn. 463, 472. It is generally held immaterial that such declarations were made after suit was brought. *True v. Plumley*, 36 Me. 466, 478; *Zeliff v. Jennings*, 61 Tex. 458, 464. But in the case of a subsequent publication of a libel or slander, the jury is to be cautioned against giving damages for the subsequent publication as such. *True v. Plumley, supra*. New York, and possibly Tennessee, are in accord with the principal case in holding that the later defamation cannot be introduced as evidence of the malicious character of the previous publication, if an action would lie for such subsequent publication itself. *Frasier v. McCloskey*, 60 N. Y. 337; *Howell v. Cheatham*, Cooke (Tenn.) 247. This view would seem to be due to a failure to notice that evidence of the subsequent publication is not introduced as in itself a ground of damages, but only as evidence of the character of the prior publication, and so of the proper amount of exemplary damages; while in a separate action for such subsequent defamation the damages would be solely for the publication itself.

**TRUSTS — CHARITABLE TRUSTS — GIFT OF CEMETERY.** — A deed of land was made to certain school districts for the purpose of establishing a cemetery. The grantees were incapable of taking the legal title. *Held*, that the deed created a charitable trust. *Phunt v. Tolles*, 52 Atl. Rep. 1042 (Vt.). See NOTES, p. 128.



TRUSTS — CONFUSION OF TRUST FUNDS — FOLLOWING TRUST RES. — A trustee deposited in a bank to his own credit funds held in trust for the plaintiff. Subsequently he deposited to the same account a second sum, a part of which was his own property and the remainder a trust in favor of one Moors, the proportions not being exactly ascertainable. The trustee afterwards drew upon the account for his own use, thereby reducing it to a sum admittedly less than the interest of Moors. The trustee having become bankrupt, the plaintiff claimed priority on the balance of the account. *Held*, that he cannot trace his trust fund into this balance and must come in with the general creditors. *In re Mulligan*, 116 Fed. Rep. 715 (Dist. Ct., Mass.).

While this result does not seem open to question, the grounds adopted by the court are not altogether clear. Where a trustee mingles trust funds with his own bank account, drafts made by him for his own purposes are, as against the *cestui*, charged to the trustee's share until it is exhausted. *In re Hallett's Estate*, 13 Ch. D. 696. See *National Bank v. Conn., etc., Ins. Co.*, 104 U. S. 54. The remainder is then entirely a trust fund, and further drafts by the trustee must, of course, directly affect the beneficiaries. In such cases the law seems settled that, as between the two trust funds, these wrongful drafts are charged to the one first deposited. *In re Hallett's Estate*, *supra*. See LEWIN, TRUSTS, 10th ed., 1096. The uncertainty regarding the exact amount of Moors' interest should not prevent the application of this rule, since the ultimate balance was less than the sum admittedly due him, and hence the wrongful drafts must have been greater than the petitioner's interest, which would, therefore, be extinguished. It would seem that the decision should have been based expressly on this rule, and the balance held subject to the claim of Moors as *cestui que trust*.

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## BOOKS AND PERIODICALS.

PROPOSED MODERNIZATION OF THE LAW OF DEFAMATION. — Current dissatisfaction with the present state of the law of slander and libel finds somewhat violent expression in a recent article. *Absurdities of the Law of Slander and Libel*, by James C. Courtney, 36 Am. L. Rev. 552 (July-August, 1902). Mr. Courtney points out the extent to which the modern law on the subject follows the artificial presumptions and harsh rules of the sixteenth century, and urges sweeping statutory changes. He argues that the plaintiff is too greatly favored, and would remedy the situation by compelling him to prove damage affirmatively in all cases, by giving the defendant greater leeway in establishing the substantial truth of his statement, and by allowing the defendant to show by specific instances that the plaintiff did not deserve the reputation alleged to have been injured.

It will be conceded that the law on libel and slander crystallized too early, and that the delay in freeing it from the old arbitrary rules has been unfortunate. Progress, however, has been made. For example, truth is now universally recognized as a complete defence in civil actions. *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503; see ODGERS, LIBEL AND SLANDER, 3d ed., 192. So, too, evidence that the plaintiff's reputation is bad is admissible in mitigation of damages. *Scott v. Sampson*, 8 Q. B. D. 491. Such gradual reform has undoubtedly been beneficial, and perhaps further changes are desirable. But the revolutionary legislation proposed by Mr. Courtney seems to err on the side of radicalism as much as does the present law on the side of conservatism.

In discussing the author's first suggestion, that the presumption of damage to the plaintiff be abandoned, it must be admitted that the old line between words actionable *per se* and words requiring proof of special damage was not drawn in accord with twentieth century ideas, and that there has been unfortunate reluctance to change it. But modifications in this, too, have been made, though not always in the direction of increasing the plaintiff's burden; for instance, the charge of unchastity in a woman has been declared actionable *per se*, and thus the worst error has been rectified. To force the plaintiff in every case to prove

special damage would surely be a mere shifting of severity. Damage to reputation may obviously be very real and yet extremely difficult to prove. Furthermore, even though the presumption of damage be allowed, the jury still has control over the amount of the award. Though it will rightly feel that injury will very probably follow certain reports, it will not render exorbitant verdicts where damage does not clearly exist.

The degree of exactness with which the defendant's proof must square with his previous statement in order to sustain the defence of truth cannot be precisely defined in a general rule. It is obviously wise to restrain the careless use of defamatory language. Strictness, however, easily leads to unjust results, as in the Indiana case held up to ridicule by Mr. Courtney, in which a defendant who had alleged that the plaintiff had stolen two animals was not allowed to prove that he had stolen one. *Swann v. Rary*, 3 Black. (Ind.) 299. An excellent test has been suggested: "Did the libel as published have a different effect on the mind of the reader from that which the actual truth would have produced?" ODGERS, OUTLINE OF THE LAW OF LIBEL, 99; see *Alexander v. North Eastern Ry. Co.*, 6 B. & S. 340. This test seems worthy of general adoption.

The suggestion that the defendant should be allowed to prove in mitigation of damages, by specific instances distinct from those detailed in his original statement, that the plaintiff did not deserve the reputation alleged to have been injured, seems most dangerous. It is true that the plaintiff had no right to a reputation he did not deserve, and that this is the real basis for allowing the defence of truth. But where truth is not pleaded, the admission of evidence that the plaintiff's reputation was undeserved would be unfair and unwise. It would compel him to be prepared to defend all his past life, and would afford opportunity for publishing indefinite amounts of libellous matter during the trial itself. There is also the very real, though perhaps exaggerated, danger of confusing the issue by these collateral questions.

In some respects the present law may, as Mr. Courtney charges, operate harshly upon the defendant; to some extent it may foster baseless litigation. But the actual injustice resulting from it seems inconsiderable as compared with the harm that might follow the adoption of the author's extreme views. The wise course would seem to be to strengthen the reform tendency already apparent in the courts, rather than to resort to summary legislation which would impose an undue burden on the plaintiff and remove salutary restraints on careless accusation.

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POWER OF LEGISLATURE TO REGULATE MINERS' WAGES. — As a result of the recent coal strike, the proposition has been advanced that the legislature of Pennsylvania has the power to classify the coal mines with reference to the depth and thickness of the veins, to fix schedules of reasonable minimum wages per ton for mining coal, and to impose a penalty upon any operator who may make contracts with miners for less than such wages. *Power of State Legislatures to fix the Minimum Amount of Wages to Coal Miners*, by R. M. Benjamin, 64 Albany L. J. 349 (Oct., 1902). The author supports the proposed legislation as a valid exercise of the police power, and, so far as corporations are concerned, of those powers of amendment which a state possesses over their charters. It would seem that unless it can be defended upon one of these grounds it is in violation of those clauses of the Fourteenth Amendment which forbid the states to "deprive any person of life, liberty, or property without due process of law," or to "deny to any person the equal protection of the laws." It is now settled that "liberty" includes the right to contract. *Allgeyer v. Louisiana*, 165 U. S. 578. It is also settled that a corporation is a "person" within the meaning of the Amendment. *Smyth v. Ames*, 169 U. S. 466, 526. It seems at the outset at least doubtful whether the proposed legislation is not void as denying the equal protection of the laws. *Gulf, etc., Ry. v. Ellis*, 165 U. S. 150.

Granting that the legislation is not open to the objection last stated, can one



say that it is a valid exercise of the police power? The right to contract may be regulated under that power for the purpose of protecting the public health, morals, comfort, or safety. Accordingly, the Supreme Court has sustained a law limiting the hours of labor in mines, upon the ground that the occupation is one dangerous to health. *Holden v. Hardy*, 169 U. S. 366. But a measure cannot be justified under the police power unless calculated to secure the objects for which the power exists. For this reason, legislation limiting the hours of labor generally, or prohibiting payment except in money, or providing against deductions in wages for imperfections in work, has usually been held unconstitutional. *Low v. Rees Printing Co.*, 41 Neb. 127; *Godcharles & Co. v. Wigeman*, 113 Pa. St. 431; *Commonwealth v. Perry*, 155 Mass. 117. Inasmuch as the court in the Pennsylvania case cited above would not support a law fixing the manner of payment, it is scarcely to be expected that a law imposing a still greater limitation upon the power to contract, by fixing a schedule of wages, would be upheld.

Again, even though it be admitted that the police power is properly invoked to regulate the charges of railroads and other public service corporations, that fact can have no bearing on the present question; for the coal companies are not shown to be public service corporations. Even in the case of the latter, the prices which the legislature may regulate directly are the charges to the public, not the wages paid to employees. *Cf. Transportation Co. v. Standard Oil Co.*, 40 S. E. Rep. 591 (W. Va.).

It is further contended that the proposed legislation, so far as it applies to corporations, is a valid exercise of the powers of amending charters expressly reserved by the State. Legislation regulating the manner of payment has been held constitutional under this power. *Leep v. Ry. Co.*, 58 Ark. 407. And it is a popular idea that the power of amendment, because reserved in general terms, is therefore absolute. But the courts which have gone farthest in recognizing the power have been careful to point out by way of *dictum* that it must be so exercised as not to infringe upon constitutional rights. "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of incorporation." *Shields v. Ohio*, 95 U. S. 319, 324. "We do not mean to intimate that the legislature can by way of amendment fix or limit the compensation of employees of railroad companies." *Leep v. Ry. Co.*, *supra*. Further, the constitution of Pennsylvania provides that amendments must be "just to the corporators." It would seem that a law obliging a corporation to pay a wage greater than it would have to pay on the open market or incur a penalty would be unjust to the corporators as well as in violation of the Fourteenth Amendment.

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EXTENT OF TERRITORIAL WATERS — THE ALASKA-CANADA BOUNDARY. — The Anglo-Russian treaty of 1825 fixes as the boundary between Alaska and British Columbia in certain places, a line "parallel to the windings of the coast" and never exceeding the "distance of ten leagues therefrom." The United States, the successor of Russia as sovereign of the seaboard strip, claims that this line should run parallel to the coast line of certain salt water inlets, such as the Lynn Canal. This claim is criticised in a lately published article, on the ground that, since the breadth of these inlets at the mouth is less than six miles, they are territorial waters and hence should be disregarded in determining the boundary. *The Alaska-Canada Boundary Dispute*, by Thomas Hodgins, *Contemp. Rev.*, No. 440, p. 190 (Aug., 1902).

That inlets not more than six miles broad are territorial waters is a necessary corollary of the well-recognized principle that such is the status of all waters within three miles of a coast. *Com. v. Manchester*, 152 Mass. 230. If, therefore, such inlets are to be disregarded in fixing the boundary for the reason that they are territorial waters, all waters up to the three mile limit should be disregarded for the same reason. In that event the distance of ten leagues from the coast would be measured not from the shore line but from the three mile limit. —

a result which clearly cannot be supported. It would seem, therefore, that the boundary dispute is not a question of territorial waters, but turns simply on the proper construction of the treaty as a document.

The writer also suggests that the claim of the United States is inconsistent with its assumption of sovereignty over Delaware Bay, Chesapeake Bay, and similar bodies of water whose breadth is greater than six miles. But this jurisdiction seems to involve principles different from those governing the boundary dispute, since it is essentially a question of territorial waters. The propriety of the jurisdiction is not discussed by Mr. Hodgins, and it is now hardly open to question. That it is claimed and exercised is well settled. *The Grange*, 1 Op. Attys. Gen. 32; *Stetson v. United States*, 32 Albany L. J. 484. While it has frequently been suggested that waters beyond the three mile limit may be territorial, the principle underlying the doctrine and the extent of its proper application have apparently never been indicated. See 1 KENT COM. 26-31. That wide claims over the open sea cannot be upheld was shown by the award in the Behring Sea Arbitration. See 27 Am. L. Rev. 703. But an inlet or arm of the sea, even if more than six miles wide, which lies fairly within the general contour of a coast, seems to be recognized by international law as subject to the same sovereignty as that coast. *Reg. v. Cunningham*, Bell's Cr. Cas. 72. See 2 Documents of Halifax Commission, 1899-1906. This doctrine seems naturally suggested by the geographical outline of such a coast. It is also supported by reasons of expediency; for sovereignty over these inlets is essential to the security of the nation which controls the coast; they also lie so far within the power of that nation that in many cases it would be difficult to dispute its authority. The latter reason seems somewhat analogous to that which originally determined the three mile limit, namely, that at no greater distance could control be exercised, three miles then being the extent of effective cannon range. HALL, INTERNAT. LAW, 4th ed., 160.

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THE EMPLOYERS' LIABILITY ACTS AND THE ASSUMPTION OF RISKS, in New York, Massachusetts, Indiana, Alabama, Colorado, and England. By Frank F. Dresser. St. Paul: Keefe-Davidson Company. 1902. pp. xii, 881. 8vo.

The past fifteen years have witnessed rapid and substantial development in this topic of the law, so that to-day in those jurisdictions which have enacted employers' liability acts, they form the basis, in whole or in part, of a very large proportion of all tort actions. As all the acts are in the main uniform, the interests of the business community manifestly demand their consistent interpretation and application. A work, therefore, like the present, which aims to ascertain and systematize the complicated results of the mass of recent cases on the subject, performs a most important service.

The author first treats of the character, purpose, and scope of these statutes, giving special attention to their effect in increasing the employer's liability at common law. This common law liability is clearly and concisely stated, and the direction and limits of its statutory extensions are plainly indicated. After a brief consideration of the questions of parties and damages. Mr. Dresser discusses with thoroughness and detail the grounds and conditions of liability established by the acts, analyzing certain principles and interpretations which have now become firmly settled, and dealing fully with many of the rather perplexing questions that frequently arise.

The latter half of the book consists of an excellent discussion of the doctrine of assumption of risk, as it is applied both at common law and under the acts. Here the too frequently neglected distinction between that assumption of risk which arises out of the relation of master and servant and the wider doctrine of *volenti non fit injuria* is carefully preserved. The former doctrine is also of comparatively recent development, and this treatment of it in the light of late decisions will prove of considerable value.

Unfortunately the author not infrequently weakens the force of his thought by stating principles in old, inaccurate, and stereotyped forms. Thus the duty of the employer to provide safe appliances, the servant's right to insist on such appliances, and his obligation to assume the risks incidental to the business, are referred to as contractual. Yet they exist entirely apart from any *animus contrahendi*, and no one would ever attempt to enforce them by the machinery of the law of contracts. They are merely correlative rights and duties pertaining to the relation of master and servant, whether that relation is created by contract or not. Similar loose statements are occasionally met with in other parts of the volume. But in spite of these minor blemishes the book is an excellent production, and will prove of great service to the average practitioner. An appendix containing the language of the different acts, a most comprehensive index, and valuable collections of cases on all points throughout the volume, add greatly to its usefulness.

W. H. H.

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OUTLINES OF CRIMINAL LAW. By Courtney Stanhope Kenny. Cambridge (Eng.): The University Press. New York: The MacMillan Company. 1902. pp. xxii, 528. 8vo.

In this volume, divided into four parts, Professor Kenny offers the substance of a course of lectures which he has given at Cambridge University for the past twenty-five years. The first part discusses the elementary principles of Criminal Law, embracing chapters on such general subjects as the Purpose of Punishment, Intent, Exemptions from Responsibility, and Inchoate Crimes. The second is more specific in its nature and deals with particular offences, defining the more important common law crimes and presenting an analytic study of the essential elements of each. The third and fourth parts, somewhat shorter than the others, are concerned with matters of evidence and criminal procedure respectively. An interesting chapter on "The Problems of Punishment" is included, the subject being treated from the standpoint of the sociologist. The concluding chapter suggestively forecasts some possible reforms in the criminal law of England and in its administration.

To those not far advanced in the study of legal topics the book will prove to be of much value, and to them it may be heartily recommended for its clear presentation of the fundamental principles of criminal law. It is not and does not assume to be an exhaustive treatise, but is rather professedly and really an "elementary manual," covering only the main points of each subject, but treating them in a style admirably simple and compact. The propositions laid down are not discussed in the abstract alone, but are abundantly illustrated by concrete cases from the reports.

The work is for the most part free from inaccuracies. In rare instances, however, one feels that the reasoning of courts has been too unhesitatingly accepted. An example of this is perhaps to be seen in the apparent lack of discrimination in the treatment of necessity as a ground for exemption from responsibility.

The American reader will find the small portion of the volume dealing with procedure of little importance, since the author confines his discussion principally to the practice of the English courts. On disputed questions of law, too, the English decisions are generally stated to the exclusion of the American. But in the broad, elementary view taken by the author these differences are comparatively few and minor, and serve only to emphasize a more general agreement. While it is probably true that the book is not entitled to the highest rank as a volume of reference, it will nevertheless repay careful study by the beginner and occasional examination by the lawyer. It deserves cordial recognition.

**A TREATISE ON THE LAW OF MASTER AND SERVANT**, including therein Masters and Workmen in Every Description of Trade and Occupation, with an Appendix of Statutes. By Charles Manley Smith. Fifth edition by Ernest Manley Smith. London: Sweet & Maxwell, Limited. 1902. pp. xcvi, 823. 8vo.

A reader who approaches this book with the expectation of finding a theoretical discussion of the various legal problems which arise out of the relationship of master and servant, will turn away disappointed. But if one desires a reference manual, he will find here an accurate and concise statement of the English law, supported by a collection of the most important decisions. The first edition, which appeared in 1852, was the pioneer among legal publications on this subject. Its purpose was to supply the need of the profession for a separate work which should make easily accessible the law relating to master and servant, which formerly had to be sought in books of general scope, such as treatises on contracts, agency, torts, criminal law, or evidence. How successfully the purpose was accomplished is shown by the demand for subsequent editions. Since the needs of the practitioner rather than the student determined the character of the book, the author was satisfied with stating the rule without seeking the reason for it. The same method of treatment has been followed in all the later editions.

Since the appearance of the fourth edition in 1885, numerous statutory changes and important judicial decisions have made a revision desirable. The work of the present editor, who has followed closely the manner and method of the original, has added much to the value of the book by bringing the subject completely down to date. In general, his analysis of cases is clear, and his statement of the existing rules of law, as deduced from the authorities, accurate and succinct. But in the chapter on "Combinations amongst Masters and Workmen," the treatment of the recent important decisions before the House of Lords seems scarcely adequate, the subject being dismissed with a discussion six pages in length. To American readers it will appear strange, also, to see the Fellow-Servant rule allotted so small a space as is here accorded it.

By a judicious omission of such cases and statements of the law as subsequent decisions or statutes have made of slight value, the text has been reduced about seventy pages. But the unavoidable increase in the length of the appendix of statutes has made the entire volume somewhat larger than the fourth edition.

Occasionally American decisions are cited and differences noted between the English and the American law, but the book will necessarily find its readers chiefly among those who wish to know the English law. Had the editor cared to enter upon more extended comment or criticism of the rules he lays down, the work would be of greater value to Americans.

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**REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES**, submitted to Hon. Elihu Root, Secretary of War. By Charles E. Magoon. Washington: Government Printing Office. 1902. pp. 808. 8vo.

This large volume is made up entirely of reports submitted by the Law Officer of the Division of Insular Affairs to the Secretary of War of the United States, and by him regarded as of such value as to warrant publication. The reports are in general brief, but cover a large variety of topics. They were prepared merely as advisory opinions for the use of the Secretary of War in particular cases which arose from time to time. They in no way form, nor are they intended to form, a systematic treatise on civil government under military occupation. Consequently the volume is of greater value to the student of political science than to the lawyer. Much of the correspondence between the War Department and the generals and other officials stationed in the insular possessions of the United States, is contained in this volume.

The reports show considerable familiarity with the works of international law writers, and painstaking research into the archives of the government and the reports of Congressional debates and of Supreme Court decisions. As a compendium of what statesmen, lawyers, judges, and men of action have thought, advised, decided, and done in connection with some of the most important questions of constitutional and international law that have confronted this country, the book is well worth owning; and, containing as it does the information and the advice on which the present Secretary of War has acted in many cases of far-reaching importance touching the insular possessions, it must remain of permanent interest. Some of the reports contain original legal work by the writer; but in many the work is mainly compilation, the contribution of the writer being largely in the nature of a running narrative to connect numerous and lengthy citations from the sources mentioned above. The volume has an excellent index.

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THE LAW OF INTERPLEADER as administered by the English, Irish, American, Canadian, and Australian Courts, with an Appendix of Statutes. By Roderick James MacLennan. Toronto: The Carswell Company, Limited. London: Stevens & Sons, Limited. Boston: Boston Book Co. 1901. pp. xxix, 464. 8vo.

Interpleader is a proceeding by which a person in the position of a stakeholder may compel two or more adverse claimants for the same property to litigate their rights among themselves. In the early common law the remedy lay only when, after a joint bailment, the bailee was in doubt as to which bailor had the rightful claim. The legal remedy being thus clearly inadequate, chancery early took jurisdiction and gave relief when a stakeholder, who claimed no interest in the property and was under no independent liability, desired to determine which of several claimants asserting title from a common source was the true owner. To avoid the litigation of legal claims in a court of equity, interpleader statutes now generally authorize proceedings in common law courts.

The present author is apparently the first to attempt to cover the entire subject. More than half of the book relates solely to matters of procedure. The remainder deals with the elements of the right of interpleader, but confines its discussion largely to the English and the Canadian law, making only occasional references to the American. A complete collection of local statutes and an exhaustive list of cases are included in the volume. It is apparent from the nature of the work that it will prove serviceable as a practical manual, though perhaps to English more especially than to American lawyers. It will be of distinct value also to the student who is interested in observing the different rules prevailing in the various jurisdictions in the same small field of the law.

To the doctrine of *Crawshay v. Thornton*, 2 Myl. & C. 1, the author has devoted an entire chapter. He concerns himself, however, mainly with the growth of the principle of independent liability, without entering upon a searching investigation of the reason underlying it. He concludes, in accord with the recent statutes, by adopting the liberal view that the mere fact that a stakeholder is under an independent liability to one claimant should not deprive him of the valuable remedy of interpleader. This mode of treatment is typical of the entire book. The theory of the subject is discussed but briefly; for interpleader as a remedy is based largely on considerations of practical convenience. The trend of legislation and decision, however, is considered at generous length, and the present state of the law is concisely summarized.

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SOCIOLOGIC STUDIES OF A MEDICO-LEGAL NATURE. By Louis J. Rosenberg and N. E. Aronstam. Introduction by Clark Bell. Chicago: D. P. Engelhard & Company. 1902. pp. 137. 12mo.

The authors of this little volume, one of whom is by education a lawyer and the other a physician, have here with slight modifications gathered under a



single cover much of the interesting material that has already appeared over their names at different times in various medical journals. Chapters are found discussing Crime, the Drink Evil, the Regulation of Marriage, Premature Burial, Suicide, and kindred subjects of sociologic significance.

The plan of the work is simple. As its title indicates, it does not assume to be at all exhaustive in its treatment, but merely to present briefly some leading considerations of medico-legal importance suggested by faithful study and investigation. Existing evils are pointed out, remedies are proposed and considered, and occasionally suggestions are made urging legislative interference. The authors' views are rationally presented and seem deserving of thoughtful attention, though possibly some of them may impress the reader as somewhat extreme.

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**A BRIEF OF NECROSCOPY and its Medico-Legal Relation.** By Gustav Schmitt. New York and London: Funk and Wagnalls Company. 1902. pp. 186. 16mo.

This little manual presents in clear, concise form the essential facts bearing upon the study, diagnosis, and technique involved in the conduct of post-mortem examinations. Without assuming to instruct the physician in the elements of medicine or the attorney in matters of law, it recognizes that the results aimed at in such examinations, though essentially medical in their nature, are yet of direct legal consequence. It is accordingly designed to furnish material such as, on the one hand, will enable the examiner to secure accurate and relevant data, and, on the other, will enable the attorney to subject any data or conclusions to rigid scrutiny.

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**THE HEALTH OFFICERS' MANUAL AND PUBLIC HEALTH LAW OF THE STATE OF NEW YORK**, containing the Public Health Law (Laws of 1893, Chap. 661), and all Statutes relating to the Public Health, Powers and Duties of Local Boards of Health and Health Officers, Adulterations of Food, Medical, Dental and Veterinary Practice, Pharmacy, etc., as Amended to the Close of the Legislative Session of 1902, with Annotations, Forms and Cross-References. By L. L. Boyce. Albany: Matthew Bender. 1902. pp. xii, 289. 8vo.

**THE ADMINISTRATION OF DEPENDENCIES: A Study of the Evolution of the Federal Empire, with Special Reference to American Colonial Problems.** By Alpheus H. Snow. New York and London: G. P. Putnam's Sons, The Knickerbocker Press. 1902. pp. vi, 619. 8vo.

**A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS.** By Walter Chadwick Noyes, Judge of the Court of Common Pleas in Connecticut. Boston: Little, Brown and Company. 1902. pp. xlviii, 703. 8vo.

*For list of exchanges, see p. 156.*



## EXCHANGES.

Albany Law Journal; American Bankruptcy Reports; American Law List; American Law Register; American Law Review; American Law School Review; American Lawyer; American Telephone Journal; Australian Law Times; Bar, The; Bombay Law Reporter; Brief, The; Bulletin Mensuel de la Société de Législation Comparée; Calcutta Weekly Notes; Canada Law Journal; Canadian Law Review; Canadian Law Times; Case and Comment; Cases Cited; Central Law Journal; Chicago Law Journal; Chicago Legal News; Columbia Law Review; Cumulative Index-Digest; Dickinson Forum; Green Bag; Harvard Graduates' Magazine; Insurance Law Journal; Iowa University Law Bulletin; Irish Law Times; Japan Register and Messenger; Johns Hopkins University Studies; Journal of Political Economy; Journal of Society of Comparative Legislation; Justice of the Peace; Kansas City Bar Monthly; Kansas Lawyer; Kathiawar Law Reports; Lancaster Law Review; Law, The; Law Digest and Recorder; Law Journal; Law Magazine and Review; Law Notes (Eng.); Law Notes (N. Y.); Law Quarterly Review; Law Student's Helper; Law Students' Journal; Law Times; Law Times Reports; Lawyer, The (India); Lawyer and Layman; Legal Adviser (Chicago); Legal Adviser (Denver); Legal Intelligencer; Madras Law Journal; Maryland Law Review; Medico-Legal Journal; Michigan Law Review; Natal Law Quarterly; Nation, The; National Corporation Reporter; New Jersey Law Journal; New York Law Journal; North Carolina Law Journal; Ohio Law Bulletin; Pittsburg Legal Journal; Political Science Quarterly; Punjab Law Reports; Queensland Law Journal; Review of Reviews; Revista General de Legislación Jurisprudencia; Revue de Jurisprudence; South African Law Review; Summons, The; Victorian Law Reports; Virginia Law Register; Washington Law Reporter; Western Reserve Law Journal; Yale Law Journal; Zeitschrift für Internationales Privat- und Strafrecht.

# HARVARD LAW REVIEW.

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## THE HARTER ACT.

**I**T is nearly ten years since Congress by a statute commonly known as the Harter Act<sup>1</sup> made a fundamental change in the obligation of carriers by sea. The act has been the subject of many adjudications in the federal courts, and it is now possible with a fair degree of certainty to state its most important effects, and to define the limits of the changes it has made. It is remarkable both in substance and in form. While its results have caused

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<sup>1</sup> 2 Supp. Rev. St., p. 81; 27 U. S. St., p. 445.

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

it to be described as "a novelty in maritime legislation," its wording has led to its characterization as "inscrutable." Strangely enough, it exonerates the carrier, in many cases, from liability for neglect of servants, and yet leaves him, for the most part, under his former strict responsibility for accidental loss. Actions for cargo damage now sometimes present the curious spectacle of a defendant trying to prove that the loss happened by his fault, and a plaintiff insisting that it was wholly an accident. In such a contest the defendant often has an advantage.

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SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

Approved, February 13, 1893.

The modifications which the bill underwent in its passage through Congress are significant, and throw some light upon its structure. Its main purpose, as was said in debate, was to break up the practice by which owners of ships engaged in foreign trade inserted in bills of lading clauses which purported to relieve them from liability for injuries due to neglect of agents. Such clauses, though held invalid in the federal courts, in the case of common carriers at least, were enforced in countries to which the vessels were bound, as well as in the courts of some states; and, in any case, a shipper finding such a clause in his bill of lading might suppose it valid. The bill<sup>1</sup> accordingly declared unlawful the insertion of such clauses, or of any clause impairing the shipowner's obligation to make his vessel seaworthy. As if by way of compensation, it then provided that if the vessel was seaworthy, there should be no liability for error of judgment in her navigation or management, if she were navigated with due care. But in the form in which the bill was passed, its prohibitions were considerably cut down, and its exemptions were greatly extended. The exemptions were made applicable to vessels engaged in domestic as well as to those engaged in foreign trade, and gave relief from the consequences of fault in navigation or management of the ship as well as from the consequences of error in judgment. At the same time the right to exemption was made to depend, not on seaworthiness, but on the exercise by the owner of due diligence to make seaworthy.

#### AGREEMENTS RELATING TO NEGLIGENCE.

Sections one and two of the Harter Act declare unlawful agreements in a contract for the carriage by water of goods to be exported from or imported into the United States, which purport to relieve the carrier from liability for negligence of agents generally, or for negligence in the loading, stowage, custody, care, or proper delivery of cargo, or for negligence in equipping, manning, provisioning, outfitting, or otherwise making the vessel seaworthy. It seems to follow that such agreements are unenforceable, not only in the federal courts, but in the courts of all the states, whether the vessel be a common carrier or a private carrier. It is not necessary that the agreement specify negligence. If it appears from its terms that it may cover a case

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<sup>1</sup> P. R. 9176.

of negligence, it is unenforcible as applied to such a case.<sup>1</sup> Otherwise the statute might be evaded by changing the language of the agreement and broadening its scope. The sections apply to a contract made in a foreign country, so far as to render it unenforcible here. It makes no difference that the stipulation is valid in the country where it was made, or where the goods are to be delivered; for though it may in some cases be the law of the United States that the rights of parties to a contract should be determined by the application of the rules of law prevailing where the contract was made, or was to be performed, there can be no application of foreign law where a domestic statute prescribes the rule to be applied.<sup>2</sup> And it does not matter that the exemption is only conditional (at least if it is of the kind mentioned in section two), and that the shipper by performing the condition can easily prevent its taking effect. For section two declares unlawful all stipulations by which the duty to take care, in the respects therein enumerated, "shall in any wise be lessened, weakened, or avoided." Consequently an agreement that a carrier shall not be liable for goods, unless their value is stated in the bill of lading, is void as applied to a loss due to negligence in stowage and delivery, because it weakens or lessens the obligation to take due care which exists whether the value is mentioned in the bill of lading or not.<sup>3</sup> But the act does not affect a stipulation limiting liability to an amount fairly agreed upon as the value of the goods,<sup>4</sup> for such a stipulation does not attempt to alter the legal relation of the parties. It only settles a question of fact.

#### SCOPE OF THE EXEMPTIONS.

The section which has oftenest brought the Harter Act before the courts is section three. This section provides that if the owner has exercised due diligence to make his vessel "in all respects seaworthy and properly manned, equipped, and supplied," neither owner, vessel, nor charterer shall be held "responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel," nor for losses arising from other enumer-

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<sup>1</sup> *Calderon v. Atlas Steamship Co.*, 170 U. S. 272.

<sup>2</sup> *Knott v. Botany Mills*, 179 U. S. 69.

<sup>3</sup> *Calderon v. Atlas Steamship Co.*, 170 U. S. 272.

<sup>4</sup> *Ibid.*

ated causes, including dangers of the sea. For many of these causes, however, the carrier was not liable even before the act.

The section, literally interpreted, would be revolutionary. It would practically wipe out the law of marine collision. But it must be construed in connection with the other sections of the act, and confined to the subject with which the rest of the act is concerned, — the responsibility of a carrier to the owner of the cargo he carries for damage to such cargo. Accordingly it has been said that the act “merely gives a statutory bill of lading.”<sup>1</sup> It does not relieve a shipowner from liability for damage to another vessel with which his ship collides through fault in navigation.<sup>2</sup> Nor for damage to cargo on the other vessel.<sup>3</sup> And as, in terms, it applies only to vessels that carry “merchandise or property,” so it applies only to the property that such vessels carry and does not relieve the owner from liability for injuries to passengers.<sup>4</sup>

It has also been held that the act does not apply to injury to passengers’ baggage;<sup>5</sup> but it is worth noting that in *The Kensington*<sup>6</sup> the Supreme Court of the United States went a long way around in order to avoid deciding this question.

The exemptions of the act are of broader application than its prohibitions. They are not confined to foreign, nor even to interstate commerce, but apply wherever goods enter or leave a port of the United States. They apply even to vessels which run exclusively between ports of the same state.<sup>7</sup> Foreign as well as domestic vessels are entitled to their benefits,<sup>8</sup> even though the contract of carriage is made in a foreign country.<sup>9</sup>

#### FAULTS OR ERRORS IN NAVIGATION OR IN MANAGEMENT.

The most important of the exemptions is that which relates to damage resulting from fault or error in navigation or in the

<sup>1</sup> Putnam, J., in *The Chattahoochee*, 74 Fed. Rep. 899 (C. C. A.).

<sup>2</sup> *The Delaware*, 161 U. S. 459.

<sup>3</sup> *The Chattahoochee*, 173 U. S. 540, 555.

<sup>4</sup> *The Rosedale*, 88 Fed. Rep. 324; *Moses v. Hamburg-American Packet Co.*, 88 Fed. Rep. 329; *In re California Navigation and Improvement Co.*, 110 Fed. Rep. 678.

<sup>5</sup> *The Rosedale*, *supra*; *In re California Navigation and Improvement Co.*, *supra*.

<sup>6</sup> 183 U. S. 263.

<sup>7</sup> *In re Piper Aden Goodall Co.*, 86 Fed. Rep. 670.

<sup>8</sup> *The Silvia*, 171 U. S. 462; *The Chattahoochee*, 173 U. S. 540; per Mr. Justice Brown at pp. 550-51.

<sup>9</sup> *Knott v. Botany Mills*, 179 U. S. 69, *semble*.



management of the vessel. The word "fault" imports negligence; "error" covers a mistake of judgment that does not amount to negligence.<sup>1</sup>

What is included under navigation or the management of the vessel? This has been discussed in many cases. It is to be noted that the relief which the Harter Act grants in respect to fault in management of the vessel is preceded by a prohibition against contracting for relief from fault in "the loading, stowage, custody, care, or proper delivery" of cargo. Hence it is generally assumed that the two classes of fault are mutually exclusive, so that nothing is fault in the management of the vessel, which is fault in stowage or care of cargo. No doubt this is true; and yet, in determining whether a fault is within the exempted class, it is as important to consider whether it is not management of the vessel, as whether it is care of cargo. Management is at least as specific as care, and the question at issue is whether the fault is a fault of management. Yet it is generally inexactly stated as being the question whether the fault is in stowage or care of cargo; and cases are sometimes decided against the vessel, because the fault seems to be a failure in care of cargo, without a considered determination that it is not a fault in management.<sup>2</sup> The object of the navigation of the vessel is the safe transportation of her cargo. The exemption of fault in management or navigation relates, as has been said, to liability for damage to cargo. But so far as concerns such liability, every fault in navigation or in management is a fault simply because it is likely to interfere with the safe transportation of the cargo. In some sense, then, every such fault is a fault in care of cargo, and cases may arise in which it is hard to tell whether the fault which has caused the loss is a fault in management of vessel, for the consequences of which the carrier is relieved, or is a fault in care of cargo, from the consequences of which he is forbidden to exonerate himself even by agreement.

It is clear that a wrong manœuvre leading to collision is a fault

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<sup>1</sup> *The Guadeloupe*, 92 Fed. Rep. 670. In *The Manitoba*, 104 Fed. Rep. 145, 154, it was said that "running upon an unknown or uncharted reef would be error in navigation through ignorance though not a fault." But error usually implies unwise choice, or error of judgment. When danger is unsuspected there is no room for choice. There can be no error of judgment where there is no exercise of judgment. If all damage which might have been averted by a different handling of the ship is to be treated as the result of "error," the exemption will cover most cases of accidental loss.

<sup>2</sup> See *The Manitoba*, 104 Fed. Rep. 145, 158; and *Knott v. Botany Mills*, 179 U. S. 69.

or error in navigation or management within the act.<sup>1</sup> So is the negligent selection, at a port of call, of an improper anchorage.<sup>2</sup> So, it seems, is negligent failure to send a lookout forward when it leads to a collision.<sup>3</sup> And so is failure to close a port upon the approach of rough weather, though the damage to be feared is injury to cargo, not to ship.<sup>4</sup> In such a case, Mr. Justice Gray, for the court, said of the words "navigation and management":

"They might not include stowage of cargo not affecting the fitness of the ship to carry her cargo.<sup>5</sup> But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas."

The same principle of distinction is recognized in the English cases of *The Glenlochil*,<sup>6</sup> and *The Rodney*,<sup>7</sup> in which the bills of lading "incorporated" the Harter Act. In *The Glenlochil*, the negligence occurred in filling a ballast tank at the port of destination in order to stiffen the ship, after her cargo had been partly unloaded. Sir F. H. Jeune, holding the owner exempted, said<sup>8</sup> that the exemption covers "not direct want of care in respect of the cargo," but fault "primarily connected with the navigation or management of the vessel, and not with the cargo"; and drew the line of demarcation<sup>9</sup> between "want of care of cargo, and want of care of vessel indirectly affecting the cargo." In *The Rodney*, a boatswain, in clearing out for his own convenience a stopped pipe which served to drain the quarters of the crew, negligently knocked a hole in it which admitted water to cargo below. Sir F. H. Jeune considered that the carrier was not responsible, for the reason, that the act which caused the damage was done "in keeping the vessel in her proper condition"; and Gorell Barnes, J., placed the decision on the ground that it was "improper handling of the ship as a ship which affects the safety of the cargo."<sup>10</sup>

<sup>1</sup> *The Albert Dumois*, 177 U. S. 240.

<sup>2</sup> *The Etona*, 64 Fed. Rep. 880.

<sup>3</sup> *The Rosedale*, 88 Fed. Rep. 324, 328.

<sup>4</sup> *The Silvia*, 171 U. S. 462.

<sup>5</sup> It has been held in District Courts that the words do not include stowage even when it does affect the fitness of the ship to carry her cargo. *The Whitlieburn*, 89 Fed. Rep. 526; *The Oneida*, 108 Fed. Rep. 87.

<sup>6</sup> [1896] P. 10.

<sup>7</sup> [1900] P. 112.

<sup>8</sup> [1896] P. 10, at p. 15.

<sup>9</sup> *Ibid.* at p. 16.

<sup>10</sup> [1900] P. 112, at p. 117. In *Rowson v. Atlantic Transport Co.*, 19 T. L. Rep. 67 (K. B. D., Nov. 19, 1902), the negligent working of a ship's refrigerating apparatus causing damage to cargo was held to be a fault or error in management of the vessel within the provision of the Harter Act.

In accordance with this principle, it is held that the improper using, or testing, or failure to test, pumps, valves, sluices, or sounding-pipes during the voyage is a fault in management although the sole likelihood of damage is to cargo.<sup>1</sup> And it is a fault in management though it occurs after the voyage is over, and some cargo has been discharged.<sup>2</sup>

On the other hand, it had been held in England, before the Harter Act went into effect, that insecure stowage was not a "fault in navigation or management of the vessel" within the exceptions of a bill of lading,<sup>3</sup> and it clearly is not such within the Harter Act.<sup>4</sup> It also seems clear that where a ship takes cargo for several ports, neither a failure to take care that the cargo for each port is so stowed that it will be found on arrival, nor a failure to look at the manifest on arrival to see what cargo is on board, is a fault in navigation or management, since such fault pertains more directly to stowage and delivery of cargo.<sup>5</sup>

It is hard to state in general language, what will constitute direct want of care of cargo, as distinguished from want of care of ship indirectly affecting cargo; but the distinction may be illustrated by the decisions. For example, where the lightening of the vessel by discharge of cargo at an intermediate port produced a trim which was likely to damage and did damage hides loaded and stowed at a prior port, by causing drainage to run upon them from sugar also loaded and stowed at a prior port, it was held that this was not a fault in management, because it was a fault in loading or stowage, and that the ship was liable for the consequences.<sup>6</sup> It is worth noting that here the original stowage was proper and that the subsequent carelessness, though it consisted in a failure to preserve the vessel's trim by filling or emptying ballast-tanks, was considered to be a failure to take care to maintain a condition of proper stowage. Where the damaged cargo is originally properly stowed, but other cargo loaded at an intermediate port is so placed in the vessel as to make her unstable, so

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<sup>1</sup> *The Mexican Prince*, 82 Fed. Rep. 484; *The British King*, 89 Fed. Rep. 872; affirmed 92 Fed. Rep. 1018; *The Sandfield*, 92 Fed. Rep. 663; *The Ontario*, 106 Fed. Rep. 146; *The Merida*, 107 Fed. Rep. 146; *The Rodney* [1900], P. 112.

<sup>2</sup> *The Glenlochil* [1896], P. 10.

<sup>3</sup> *The Ferro* [1893], P. 38.

<sup>4</sup> *The Frey*, 92 Fed. Rep. 667; *The Palmas*, 108 Fed. Rep. 87; *The Mississippi*, 113 Fed. Rep. 985.

<sup>5</sup> *Calderon v. Atlas Steamship Co.*, 170 U. S. 272.

<sup>6</sup> *Knott v. Botany Mills*, 179 U. S. 69.

that she has to put into a port of distress for her own safety, as well as for safety of cargo, it has been held that the case is not within the exemption of fault in management.<sup>1</sup> So, too, an omission before the vessel sails to provide ballast necessary because of the way she is loaded, has been held to be, in effect, a fault in loading, and so not a fault in management.<sup>2</sup>

#### DILIGENCE TO MAKE SEAWORTHY.

The Harter Act does not, in terms, grant its exemptions absolutely. It says that "if the owner . . . shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied," he shall not be responsible for damage resulting from the causes enumerated. What is the effect of the condition ?

In the first place it is settled that it requires more for its fulfillment than personal diligence on the part of the owner. The diligence exacted is diligence in the preparation of the vessel for sea, whether the work of preparation is performed by the owner in person or by his agents,<sup>3</sup> and no doubt, even if it is turned over to contractors, who are not agents.

At first sight, it seems as if there were no rational connection between the exemption granted and the condition attached to it. To say that if a man has exercised due diligence to make his vessel seaworthy, he shall not be responsible for the fault of the sailors in sailing her, seems much like saying that if a man has used care in selecting his cook, he shall not be liable for reckless driving of his coachman. The seeming incongruity has served in part as foundation for the argument that the proviso means that where there has been care to make seaworthy, there shall be no liability for damage due to unseaworthiness; that it reduces the warranty of seaworthiness to a warranty of diligence to make seaworthy; and that the risk of loss from latent defect, existing at the beginning of the voyage, rests on the shipper. In one of the earlier cases, the court expressed its conviction that such was

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<sup>1</sup> The Oneida, 108 Fed. Rep. 87.

<sup>2</sup> The Whittieburn, 89 Fed. Rep. 526.

<sup>3</sup> International Navigation Co. v. Farr and Bailey Mfg. Co., 181 U. S. 218; The Niagara, 84 Fed. Rep. 902; The Phœnicia, 90 Fed. Rep. 117; The Manitoba, 104 Fed. Rep. 145, 159; The Oneida, 108 Fed. Rep. 886; Nord-deutscher Lloyd v. Insurance Co. of North America, 110 Fed. Rep. 420, 425; Dobell v. Steamship Rossmore Co., Ltd. [1895] 2 Q. B. 408. The Jane Grey, 99 Fed. Rep. 582, is *contra*.

the design of the statute.<sup>1</sup> But the Supreme Court of the United States has held in the case of *The Carib Prince*<sup>2</sup> that the act does not relieve from the duty of furnishing a seaworthy vessel, and that for damage solely caused by a latent defect, in existence when the voyage began, the carrier is liable, in spite of having used due care. Mr. Justice Brown (dissenting upon another point) said: <sup>3</sup>

“While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence has been used to make them seaworthy, it must be conceded that the language of the third section does not express such intent . . .”

If the proviso has no effect upon loss to which unseaworthiness contributes,<sup>4</sup> what effect has it? Suppose the owner fails to have his vessel periodically examined to see if she needs repairs, but by good luck no repairs are needed, and she is seaworthy. He has none the less failed to use diligence to make her so, and it might be contended that he is not entitled to exemption if, by fault in navigation, she runs aground. But the proviso is not so interpreted. If the vessel is in fact seaworthy, the owner is exempt. In the words of Mr. Justice Brown, speaking for the majority of the Supreme Court: <sup>5</sup>

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<sup>1</sup> *The Millie R. Bohannon*, 64 Fed. Rep. 883, 884.

<sup>2</sup> 170 U. S. 655. See also *The Silvia*, 171 U. S. 462. To the same effect are *Insurance Co. of North America v. North German Lloyd Co.*, 106 Fed. Rep. 973, 975-976; *The Aggie*, 107 Fed. Rep. 300.

<sup>3</sup> 170 U. S. 655, at p. 664.

<sup>4</sup> In *The Manitoba*, 104 Fed. Rep. 145, 152-153, the court, relying on words of Mr. Justice Shiras in *The Irrawaddy*, 171 U. S. 187, 192, seems to express an opinion that damage caused by unseaworthiness concurring with fault in management is damage due to fault in management within the exemption of the act. Under this construction there would be no liability where a defect, latent on sailing, was brought into activity by careless handling of machinery, or other excepted cause, such as a violent storm. But the construction hardly seems warranted. An exemption from liability for damage described by a reference to its cause is usually regarded as an exemption from responsibility for that cause alone. Liability for unseaworthiness remains, and carries with it liability for resulting damage, whether the shipowner is responsible for concurring causes or not. In no case in the Supreme Court which involves seaworthiness is there any intimation that the Harter Act changes in any degree the effect of the assumption upon which the contract of carriage is based, that the vessel is fit for the voyage. The words used by Mr. Justice Shiras were spoken in a case which did not relate to seaworthiness, and are so comprehensive that they can only be interpreted consistently with the decision in *The Carib Prince*, by supposing them to refer to what the framers of the Harter Act intended to do, not to what they succeeded in doing.

<sup>5</sup> *The Chattahoochee*, 173 U. S. 540, 550.

" . . . by the third section of the Harter Act, the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible, etc."

And in a later case, the court said : <sup>1</sup>

" We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

It may be remarked in passing that the seeming contradiction between these passages as to the duty of establishing seaworthiness, may be explained by taking the word "proof" to mean "evidence." The result is that while a vessel will be presumed seaworthy in the absence of evidence to the contrary, yet if evidence is given of unseaworthiness contributing to the loss, the owner, if he relies on the fact that his vessel was seaworthy, must establish it by a preponderance of evidence in his favor. It is clear that in the opinion of the court seaworthiness in fact is as good as diligence to make seaworthy.

Suppose, however, that there has been neither seaworthiness nor diligence to make seaworthy, yet that damage results solely from fault in navigation. A steamship has a cracked shaft that will be dangerous in rough weather, but by negligence the crack is not discovered and she is permitted to sail without repair. No rough weather occurs. The steamer crosses the ocean in safety, but negligently comes into collision in the harbor of destination. Is the owner, who would not have been made liable for damage to his cargo by the negligent failure to examine the shaft before sailing, provided it had not been cracked, to be rendered liable by the mere fact that a crack in it existed, although its existence had not the slightest connection with the damage? The proviso is whimsical, if for such an irrelevant accident it excludes the owner from an exemption he would otherwise receive.

No case has been found in which the owner was so excluded. Although the passage last quoted from the opinion of the Supreme Court may seem at first sight to say that he should be excluded, it will appear on examination that it does not say so. It means that if the cause of the loss is a failure to use care to make sea-

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<sup>1</sup> *International Navigation Co. v. Farr and Bailey Mfg. Co.*, 181 U. S. 218, 226.



worthy, the case is not within the exemption, even though such failure is a fault in management. It does not mean that exemption would be refused for a fault in management, because of a failure to use care to make seaworthy, distinct from the fault in management and not contributing to the loss.

The sole effect of the proviso seems to be that which has just been suggested. When section three says that the owner shall not be liable for fault in navigation or management, provided diligence has been used to make seaworthy, it excludes from fault in management all carelessness in preparing the vessel for the voyage. Under this interpretation, the act is reasonable and consistent, and its language is such as might naturally be used to express its intent. The interpretation is a literal one as well. For the diligence to which the proviso refers, is diligence which it is the carrier's duty to employ. But so far as concerns liability for damage to cargo, his only duty is to avoid such damage, and, if no damage results from his lack of diligence, the carrier is at liberty to be as careless as he pleases. If his lack of diligence does not contribute to the damage, he has used all the diligence that was due, and the proviso is fulfilled. That this is true when the vessel is seaworthy, has already been seen, and it proves that the act is not intended to deprive the owner of exemption, merely because he is careless in equipping his ship. If the carelessness meant by the proviso is not the carelessness which is a breach of moral duty, so as to make the carrier morally blamable, then it ought to be the carelessness which is a breach of legal duty, and makes him legally liable, that is, carelessness which results in damage. It is an argument in favor of this construction that the diligence required is held to be diligence on the part of all for whose conduct the owner is legally liable. If the phrase about due diligence of the owner is used in reference to legal liability as regards the persons who are to exercise it and the work to be done, it would naturally be used in the same sense as regards the occasions on which its exercise is required. In short, it means, it is submitted, that the damage for which exemption is granted, must not be damage resulting from failure to employ that diligence in preparing the vessel for sea upon the exercise of which the act insists. The proviso is inserted only to make it clear that the exoneration granted is in no way to derogate from the obligation to take due care for seaworthiness. It was necessary to insert it because fault in management might otherwise be supposed to include fault in equipping

the vessel for sea. There are English cases in which even the phrase "improper navigation" was held to include such fault.<sup>1</sup>

#### APPLICATION TO CASES OF GENERAL AVERAGE.

Does the Harter Act have any application to cases of general average? If the peril which the sacrifice is made to avert, is incurred through fault in navigation, does the act change the ordinary rule which denies to a shipowner a right to receive contribution in average for a sacrifice made to avert a danger threatening the venture, when the danger arises through neglect of his servants? The Supreme Court in *The Irrawaddy*<sup>2</sup> held, by a divided bench, that the rule was not changed. The decision went upon the ground that the Harter Act does not abrogate the general principle of a shipowner's responsibility for improper navigation; that it only relieves him from responsibility so far as to say that he need not pay damages for cargo lost, but does not relieve him so far as to say that he may receive contribution in average. In other words, the principle of the decision is that the act must be interpreted as meaning only that, in case of improper navigation, the cargo owner shall no longer be entitled to throw upon the shipowner the burden of loss which has fallen upon the cargo. It is silent as to the right of the shipowner to throw upon the owner of cargo any part of the burden of loss which has fallen upon the ship, and hence it confers no such right. As it does not change the rule of law which prohibits contribution, it is immaterial

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<sup>1</sup> In *The Warkworth*, 9 P. D. 145, a collision due to a ship's failure to answer her helm was held to have been caused by improper navigation within the meaning of the English statute for the limitation of shipowners' liability, although the reason of the failure was a defect in the steering-gear caused by the neglect of the shore superintendent, and not discoverable in the ordinary management of the vessel after sailing.

In *Carmichael v. Liverpool Sailing Ship Owners Assn.*, 19 Q. B. D. 242, a negligent failure to secure a port while loading cargo, which led to damage upon the voyage, was held to be improper navigation within the meaning of articles of mutual assurance against liability. Lord Esher said (at p. 248): "If something is negligently done or omitted to be done before the navigation of the ship begins, which has an effect on her navigation while she is being navigated, is that or is that not improper navigation within the meaning of these words?" And he considered it "a very sound answer" to say, "Certainly [it is], if that negligence affected the safe sailing of the ship with regard to the safety of the goods on board during the voyage." That this interpretation did not depend upon the character of the instrument in which the words were found, appears from his statement, in *Canada Shipping Company v. British Shipowners Assn.*, 23 Q. B. D. 342, 343, that it was an interpretation according to the ordinary meaning of the words.

<sup>2</sup> *The Irrawaddy* (Flint v. Chrystall), 171 U. S. 187.

whether or not it takes away the reason upon which that rule was originally founded.

The decision seems correct, even upon this narrow ground; but it would appear that it might also have been put upon the ground that the right to average contribution is an equitable right, existing only where a loss has fallen upon one which ought in fairness to be shared by others; that where a man, who by the fault of himself or of his servants has brought the property of others into a position of peril, succeeds by his own efforts and at his own expense in averting the peril, he has done no more than he ought to do, and there is no unfairness in making him stand the loss. It was not deemed unfair before the Harter Act to make him stand it, as is clear from the fact that it was then thought proper to make him liable for the damage which happened to the cargo as well as for that which fell upon himself. If it was not unfair before the act, it is not unfair after it; and no equitable ground for contribution exists. The statute does not alter the relation in fact which exists between the owner and his servants. It does not alter the legal consequences which spring from that relation, except in so far as it prescribes that they shall be altered. It does not create an equitable ground for contribution, nor does it, under any ordinary construction, prescribe that contribution shall take place, in spite of the absence of any equity as between the parties which requires it.<sup>1</sup>

Whether a grant of a right to contribution ought to accompany the exemption from liability, is a matter for the legislature. It may strongly be urged that it ought to do so. For as the law

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<sup>1</sup> In England, a provision in a contract of carriage that the owner shall not be responsible for neglect of servants is held to enable the owner to maintain an action for contribution in general average for sacrifices made to avert a peril caused by neglect of servants. The provision is said to make the neglect foreign to the owner. This was decided in the recent case in the Court of Appeal, of *Milburn v. Jamaica Fruit Importing Co.* [1900], 2 Q. B. 540, following *The Carron Park*, 15 P. D. 203. Vaughan Williams, J., dissented in an able opinion. *The Irrawaddy* was nowhere noticed. While a contract will not necessarily receive the same construction as a statute, it seems probable that if the question should arise under a clause in a bill of lading the federal courts would follow the doctrine of *The Irrawaddy*. For the Dutch law, see *The Mary Thomas* [1894], P. 108. For the French law, see *Hick v. London Assurance*, 1 Com. Cas. 244. The case of *Le Normand v. Compagnie Générale Transatlantique*, 1 Dalloz, Jurisprudence Générale, 479, to which Mr. Justice Brown refers in his dissenting opinion in *The Irrawaddy*, as showing the law of France, seems to have concerned the right to contribution for payment of salvage which constituted a lien on the cargo, and so not to be inconsistent, in its decision at least, with *The Irrawaddy*.

stands, the shipowner in a case, say, of negligent stranding, is not responsible for loss of cargo, nor for failure to make voluntary sacrifices to save it; and yet, if he makes such sacrifices, they are, in general, at his own cost. It may be to his interest to let the cargo perish. So far as the law of general average is needed in order to encourage sacrifice and to protect owners of cargo, it is needed in such a case. The Harter Act, in the cases which it covers, in effect deprives the cargo-owner of the protection of the maritime law of general average, as regards sacrifices made by the owner of the ship.

It is to be noted that in *The Irrawaddy* it appears that the shipowner had paid salvage charges against the cargo, and that for so much of his claim as arose from the payment of salvage, his right to reimbursement was not disputed, and was not before the court. The principle of the decision would not prevent such reimbursement. It would not prevent the shipowner's recovering a sum paid with authority, implied in fact, from the owner of cargo, or paid to discharge a lien that had already attached to the cargo. For when the lien attaches, the cargo-owner loses a beneficial interest in the property, corresponding to what the lienor gains, and for this loss the shipowner is not liable. When, therefore, the shipowner, acting not officiously, discharges the lien, he is entitled under the principles of quasi-contract to reimbursement to the amount of the benefit conferred. The owners of cargo, though not liable for payments made to avert losses that did not happen, should be liable for payments made in discharge of existing claims against them or their cargo.

#### APPLICATION TO CASES OF COLLISION.

In cases of collision where both vessels are to blame the effect of the Harter Act has proved a matter of some difficulty and doubt. Before the act, the owner of cargo could recover all his damage from either vessel;<sup>1</sup> but if both vessels were before the court, he must first try to get half from each.<sup>2</sup> As between the vessels, the total damage was equally divided. The one which suffered most was allowed a claim for one-half the excess of her damage over the damage to the other; but if the other had paid more than the first for damage to cargo carried on either ship,

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<sup>1</sup> *The Atlas*, 93 U. S. 302.

<sup>2</sup> *The Alabama and The Gamecock*, 92 U. S. 695.

the amount so paid in excess was counted as a part of her own loss, and she was entitled to recoup one-half of it, in diminution of the claim against her.<sup>1</sup> What, if any, changes has the act produced? May the claim of a vessel carrying cargo be diminished by recoupment against her for damage to her cargo which the other vessel has paid, or would that be to make her responsible for damage to her cargo within the act? If the claim arising from payment of cargo damage may be urged in recoupment, may it also be pressed beyond the point at which it extinguishes the claim in favor of the carrying vessel, and made the basis of a claim against her? May she thus be not merely precluded from receiving compensation for her own injuries, but made to contribute to the payment of cargo damage by the other ship? And finally, if the owner of the non-carrying vessel takes advantage of the statute which limits the liability of a shipowner to the value of his ship and freight, as they exist at the end of the voyage, and if this value is insufficient to satisfy all claims, is the cargo to retain the preference which was accorded it before the Harter Act, or does the exoneration which the act confers, admit the carrier to claim upon an equal footing with the cargo?

In the case of *The Chattahoochee*,<sup>2</sup> where a laden schooner was run down by a steamship, it was settled that when the carrying vessel suffers most in the collision, its claim for one-half the excess of its damages may be diminished by recoupment of one-half the damages to cargo for which the other vessel has to pay. Moreover, upon the principle of that case and of authorities approved in it, it seems probable that the claim of the non-carrying vessel for cargo damage paid should be allowed even beyond the point at which it extinguishes the claim of the carrier; and that when, including as part of its loss, the damage to cargo for which it is held liable, the non-carrying vessel has suffered more than the othership, it should be permitted to recover one-half the excess of its loss. The theory of such a decision would be that to hold the carrying ship so liable by reason of the fact

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<sup>1</sup> *The North Star*, 106 U. S. 17; *The Chattahoochee*, 173 U. S. 540; *The Albert Dumois*, 177 U. S. 240.

<sup>2</sup> 173 U. S. 540. The theory that this case was decided on the ground that the same persons sued as owners of the carrying vessel and as bailees of her cargo is disposed of, if not by the language of the decision itself, at any rate by what is said about it in *The Albert Dumois*, 177 U. S. 240. It must be taken to overrule *The Viola*, 60 Fed. Rep. 296; *The Rosedale*, 88 Fed. Rep. 324, 328, and much that was said in *The Niagara*, 77 Fed. Rep. 329, 334-336.

that its lost cargo has been paid for by the other vessel, is not to hold it responsible for the loss of its cargo within the act.

The question depends, in the first place, upon the nature of the liability of one vessel to another for loss by a collision which happens by the fault of both. By the general maritime law, as understood and enforced in American courts (and as enforced in most cases in English courts in substance though not in form<sup>1</sup>) there are no cross-liabilities. There is no obligation on the part of either vessel to pay one-half or any part of the other's damages as such. Indeed, as it would be irrational to require each party to pay the whole of the other's damages, thus merely reversing the burden of loss as it falls; so, to divide each party's loss into two equal parts, and require the other party to pay the whole of one of those parts, would not eliminate the irrationality; it could at most divide it by two. The approved and reasonable view is that which makes the liability arise solely from the equitable principle that a loss due to the fault of both parties ought to be shared between them, and upon this principle regards it as an average loss — a loss on joint account. Upon this view the loss is apportioned between the parties in equal shares without undertaking to ascertain their relative degree of fault, and either party who, through injury to his own property or by paying damages to others, has borne more than half the total burden, has a right to contribution in respect to the excess for such sum as is necessary to make the burden equal, and no other right.<sup>2</sup>

The leading case is *The North Star*.<sup>3</sup> That case related to the application of the act for limitation of shipowners' liability. The vessel suffering most was a total loss, and under the act her owner was free from all claims. Yet it was held that this did not increase the amount he could recover, which was, as before, one-half the excess of his loss over the loss to the other ship; and that the owner of the other ship, in proving his own damage, and bringing it into the account, so as to reduce the claim against him, was not making the owner of the sunken vessel liable for it. The decision

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<sup>1</sup> *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795.

<sup>2</sup> In France and Belgium damages are divided in proportion to fault; in Egypt in proportion to the value of the ships. *Gow, Marine Insurance*, 249. The total burden to be divided includes damages awarded for loss of cargo or for personal injury or loss of life, even though there is no lien against either ship. *The Albert Dumois*, 177 U. S. 240.

<sup>3</sup> 106 U. S. 17.



went on the ground that the recoupment permitted was not the offsetting of a cross-claim. Mr. Justice Bradley said: <sup>1</sup>

“ According to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden.”

Frequently in the opinion, the case is called a case of average. The view of the court is indicated by its comment on the English case of *The Montreal*.<sup>2</sup> It was there held that a statute which provided that a shipowner should not be “ answerable ” for the neglect of a pilot employed by compulsion, enabled such shipowner to recover one-half his damages without deduction for damage to the other ship. Of this case, Mr. Justice Bradley disapproved. He said it was contrary to the maritime rule. The criticism demonstrates that in the opinion of the learned judge, the deduction which he thought should have been permitted, was not founded upon a responsibility on the part of the shipowner for damage to the other ship as such, because from all such responsibility he was exempted by the statute.<sup>3</sup> The criticism also assumes the point that in an action for contribution in the nature of average, a statutory exemption from liability for a certain loss does not enable the person in whose favor the exemption is made to exclude it, if it has fallen upon another, from being reckoned among the items to the total of which he must contribute. And this seems sound. For his right is only to recover such proportion of the total loss as it is fair that he should, and the fact that he is not responsible for some of its items, does not alter the fact that another has borne those items of loss so that they form part of the total, nor does it alter the proportion in which, if there is to be contribution, the total loss should be shared, which is equality.

From these considerations the decision in *The Chattahoochee* follows of necessity. The schooner was not held liable for any

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<sup>1</sup> 106 U. S. 22.

<sup>2</sup> 17 Jur. 538; s. c. Eng. L. & E. Rev. 580.

<sup>3</sup> It may be asked why, if the statute does exempt the owner from all responsibility, he should not, on the view of the English courts, get full damages instead of only half damages. In *The Hector*, 8 P. D. 218, Brett, J., could only answer this by saying that logically he ought to get full damages, but by settled practice he gets only half. The inconsistency of the English rule proceeds from a partial but incomplete recognition of the fact that the liability is founded on the principle of contribution, not on direct responsibility as for tort.

part of the cargo damage. The case was simply that the happening of damage to the cargo of the schooner and the enforcement of the steamer's liability for it, increased the total of loss, and so diminished the amount by which the damage to the schooner exceeded her just share, and to that amount alone had she any claim.

And it also follows, that if the cargo damage paid by the steamer had exceeded the damage to the schooner, and the steamer had attempted not merely to recoup, but to obtain a decree in its own favor for half the excess, it would have been entitled to do so, so far as concerns the Harter Act, unless in such a case the Harter Act abolishes the right of contribution for loss which consists in paying damages for cargo. It was held in *The Chattahoochee* that, in ascertaining whether the non-carrying vessel had borne its share of the loss, the exoneration of the carrier from liability did not affect the inclusion of cargo damage as a part of the loss to be shared, nor the inclusion of its payment by the other vessel as a part of the share which it had borne. This involves the principle that accountability as between the vessels is independent of the liability of the vessel to its cargo; that the loss to be shared is not that for which both vessels are liable, but that for which both vessels are to blame. If so, it would seem that the carrier was bound to contribute to the loss suffered by the other vessel in paying cargo damage, even though not liable for such damage itself, and that consequently its obligation to contribute is an obligation distinct from and independent of liability for cargo damage, and that its enforcement does not create responsibility for such damage within the Harter Act. The thing contributed to is not the loss to the cargo-owner, but the loss to the owner of the non-carrying ship. The event which determines the right to contribution is the falling of loss upon the owner of such ship. The Harter Act does not give a general right to navigate carelessly. It does not alter the fact that the carrier's carelessness has helped to bring about a loss which has fallen upon the other vessel, nor that the carrier is in fairness bound to share its burden. The liability of the non-carrying vessel for damage to cargo is a part of the burden of her loss. It weighs as heavily upon her owner as does his liability for the cost of repairs. The same reasons that entitle him to contribution for expenses of repair, entitle him to contribution for expenses of discharging liens upon his vessel that have arisen in favor of owners of dam-

aged cargo. The carrier's fault in navigation which concurs to create such liens may well be deemed a breach of duty to the owner of the other ship. The sum paid in contribution is paid as partial indemnity for his loss. It is not paid as damage to cargo.

If the Harter Act abolishes the right to such contribution, it exonerates the carrier only to throw the burden upon the owner of the other ship. The futile injustice of this result, which could not have been intended, so weighed with the court in *The Viola*,<sup>1</sup> that the learned judge, who there held that the statute prevented even recoupment on account of cargo damage paid, considered that the cargo-owner should be made to bear the loss from which, in his opinion, the carrier was freed. The literal wording of the section exempts ships from liability for all damage to cargo, and it is only by implication that its operation is confined to their own cargoes. The court embraced the opportunity to interpret the section literally, so far as related to such part of the loss. But it is exceedingly curious to make the non-carrying vessel pay half the damages because under one construction of the act she is not exempted, and to relieve her from the other half because under another construction she is exempted entirely.

There is nothing in the opinion of the Supreme Court in the *Chattahoochee* case inconsistent with the theory that the carrier is bound to contribute to the payment of cargo damage by the other vessel. The language of the Circuit Court of Appeals strongly implies that the carrier is so bound. The Harter Act, said Judge Putnam,<sup>2</sup> "merely gives a statutory bill of lading." It "has no proper relation to claims between colliding vessels." The status of such claims is "precisely the same as though the cargo lost had been the lading of a third vessel involved in the collision, but in no way at fault."

The Act does not affect the rule that where the owner of one of the vessels in collision limits his liability to an amount insufficient to pay all claims against him, the claim of non-negligent owners of cargo is preferred to that of the owner of another vessel whose fault contributed to the loss.<sup>3</sup> Except so far as the act frees the carrier from responsibility for negligent navigation, it leaves

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<sup>1</sup> 60 Fed. Rep. 296, 297.

<sup>2</sup> *The Chattahoochee*, 74 Fed. Rep. 899.

<sup>3</sup> *The George W. Roby* (*Miller v. Lakeland Transportation Co.*), 111 Fed. Rep. 601. Writ of certiorari was three times applied for and denied. 184 U. S. 698, 699.

him responsible for it. He is no longer bound to pay damages, but he is subject to all other legal consequences of his fault, and must still submit to having his cargo's claim against the other vessel preferred to his own.

If what has been said is correct, then the Harter Act has no effect in collisions where both vessels are to blame, unless the non-carrying vessel is not before the court, or limits its liability to an amount insufficient to pay claims for cargo. In such a case, the cargo-owner must lose his former remedy against the carrying ship.

The exemptions of the Harter Act seem to have no effect except to relieve the shipowner from having to pay the cargo-owner for cargo lost or damaged. This is consistent with the purpose of its framers. Their object was to regulate the relation between shipper and carrier.

*Frederick Green.*

## THE SUPREME COURT AND THE SHERMAN ANTI-TRUST ACT.

**T**HE Act, passed by Congress July 2, 1890, and known as the Sherman Anti-Trust Act, has been in existence now for over a decade, and during that time has been frequently before the courts for construction. Numerous decisions upon it have been rendered by the United States Circuit Courts, the United States Circuit Courts of Appeals, and the United States Supreme Court, and while these decisions are by no means all of equal weight, yet they all are worth study as showing the growth of legal opinion. It will be impossible, however, in a single article, to review such a mass of authorities in any detail, and the aim of the present article is more restricted. It is proposed here simply to deal with the decisions upon the Act rendered by the United States Supreme Court, — those alone of final authority, — and to ascertain as accurately as may be, the scope of the Act in the light of such decisions. This inquiry may not be altogether untimely, inasmuch as such a knowledge is indispensable to a correct judgment upon the many propositions, now rife, in the guise of amendments of the Act, or changes even in the Constitution itself.<sup>1</sup>

The Act was framed under the commerce and territorial clauses of the Constitution, and in terms is very broad.

“SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

“SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopo-

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<sup>1</sup> See Attorney General Knox's recent speech, and the following amendment to the Constitution, proposed in Congress, but defeated for want of a two-thirds vote :

“SECTION 1. All powers conferred by this article shall extend to the several States, the Territories, the District of Columbia, and all Territories under the sovereignty and subject to the jurisdiction of the United States.

“SECTION 2. Congress shall have power to define, regulate, control, prohibit, or dissolve trusts, monopolies, or combinations, whether existing in the form of a corporation or otherwise.

“The several States may continue to exercise such power in any manner not in conflict with the laws of the United States.

“SECTION 3. Congress shall have power to enforce the provisions of this article by appropriate legislation.”

lize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

"SECTION 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. . . ."

By a singular oversight, the provisions of section 2, in relation to "monopoly," were not extended to territorial trade or commerce, but were confined to interstate and foreign trade and commerce. Practically, however, the omission is immaterial, for the Supreme Court has held, that the words "combination in the form of trust or otherwise," used in section 1, mean a combination in any form whatever, whether of trust or otherwise, and a "monopoly," subject to the provisions of section 2, would therefore undoubtedly be similarly subject to the provisions of section 1. It could not escape as a corporation. The difficulty is not here. The great controversy has been, not that the Act insufficiently defined a trust, difficult as such a definition is, or that the evil aimed at was not otherwise adequately reached by the Act, but that the cases complained of were cases, not of *interstate* or *foreign* trade or commerce, but of *state* trade or commerce. The whole agitation turns upon this point. Indeed, the decisions of the Supreme Court upon the scope of the Act, aside from this trade or commerce feature of it, have been most liberal. For example, the Court has held:

1. That (as above stated) a "combination" in any form whatever, whether of a trust or otherwise, is within the provisions of section 1. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 326.

2. That the Act is not confined to the necessities of life. *United States v. E. C. Knight Co.*, 156 U. S. 1, 12.

3. That the "monopoly" need not be a *complete* "monopoly." *Ibid.* 16.

4. That the Act applies to carriers by railroad. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505.

5. That the words "in restraint of trade or commerce" have not their technical common law meaning, implying an *unreasonable*



"restraint of trade or commerce," but include *any* "restraint" *at all*. Ibid.

In the last ruling, it may be doubted whether the Supreme Court has not outstripped the plain intent of Congress. Mr. Hoar, the Chairman of the Senate Judiciary Committee, which reported the bill, said, on presenting it to the Senate: "We have affirmed *the old doctrine of the common law* in regard to all interstate and international commercial transactions."<sup>1</sup> And Mr. Edmunds, who was a member of the same Committee, and had a hand in the drafting of the measure, shortly after, added, in the course of debate: "We all felt it, and the committee, I think, unanimously, including my friend from Mississippi [Mr. George], thought that if we were really in earnest in wishing to strike at these evils broadly, in the first instance as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, *that we should make its definition out of terms that were well known to the law already*, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise."<sup>2</sup> One inference only seems possible, namely, that Congress purposed declaring illegal, in respect of *interstate* trade and commerce, what was illegal at common law in respect of *state* trade and commerce. The Court, however, went further, and held that Congress meant not only contracts which were at common law *illegally* in restraint of trade, but contracts which were *legally* so. Also, that the statute thus construed was constitutional. No ruling could be broader.

So far, no complaint. Congress, however, is a body of limited, and not of general powers, and no law relating to interstate and foreign trade and commerce can exceed the specific grant to Congress in that behalf without being unconstitutional. The question, then, arises, What are the powers of Congress over interstate and foreign trade and commerce? Of course, its powers over territorial trade and commerce are as broad as those of the States over state trade and commerce, and no difficulty arises as to the scope of section 3 of the Act. The doubt concerns alone interstate and foreign trade and commerce and the provisions of sections 1 and 2, but is most important, as interstate and foreign trade and commerce, of course, form the chief bulk of the entire trade and commerce of the country.

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<sup>1</sup> Cong. Rec. xxi. pt. 4, p. 3146.

<sup>2</sup> Ibid. p. 3148.

Three decisions have been rendered by the Supreme Court upon this point, to wit :

(1) The Sugar Trust Case: *United States v. E. C. Knight Co.*, 156 U. S. 1.

(2) The Livestock Exchange Cases: *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604.

(3) The Iron Pipe Case: *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211.

(1) In the Sugar Trust Case the Supreme Court held that there was a distinction between "manufacturing" and "trade and commerce," and that, while operations affecting "manufacture" might also indirectly affect "trade and commerce," yet they did not directly do so, and therefore were not matters of federal jurisdiction. It must not be understood, however, that the Court went so far as to hold that because the Trust was a manufacturing concern, it was not therefore subject to the jurisdiction of Congress, to the extent that it took part in interstate and foreign trade and commerce. For example: If, in the words of section 2 of the statute, it were proved that the Sugar Trust had monopolized, or had attempted to monopolize, or had combined or conspired with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, a case would be made out within the meaning of section 2, and the Sugar Trust, like any other person, would be subject to the provisions thereof. No attempt of this character was made in *United States v. E. C. Knight Co.* The only purpose of that suit was to prevent the amalgamation of certain competing refineries, and not to control their operations after amalgamation. This is as far as the decision goes, although an impression to the contrary has considerable popular support. See opinion:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such ; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property ; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold ; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several

States or with foreign nations ; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations ; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers ; yet the Act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce " (pp. 16, 17).

(2) In the Livestock Exchange Cases the Supreme Court held that the members of the Kansas City Livestock Exchange and the Traders' Livestock Exchange were not engaged in interstate or foreign trade or commerce, and that the by-laws of such Exchange, affecting the action of members, could not therefore be a regulation of such trade or commerce. In other words, to bring a case within the provisions of the Act, it is not sufficient to show that parties deal in articles of interstate trade or commerce, but it must be shown that the act complained of is an act in restriction of such trade or commerce. Hence, further, as the business of both Exchanges was not interstate or foreign trade or commerce, but state trade or commerce, whether the members of the Exchanges acted as commission merchants or as principals was immaterial.

(3) In the Iron Pipe Case there was an agreement between

various competing companies regulating the method of selling iron pipes throughout the country. The different companies were manufacturers of pipes, in the same manner as the sugar refineries were manufacturers of sugar, but the agreement here related to the method of disposing of the articles of manufacture, and not to the form of organization of the producer, and therefore, unlike the merger at issue in the Sugar Case, amounted to a regulation of interstate and foreign trade and commerce. An injunction was accordingly issued. See opinion:

“If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced, (as it naturally would be,) the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute?

“As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-203; *Kidd v. Pearson*, 128 U. S. 1, 20. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute. The power to regulate such commerce, that is, the power to prescribe the rules by which it shall be governed, is vested in Congress, and when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature and violates the statute. We think it plain that this contract or combination effects that result.” (pp. 241, 242.)

On this review of the decisions, it cannot be said that the Sherman Anti-Trust Act is ineffective by reason of constitutional limitations, because the Act has never received a full test. Suppose that a corporation monopolizes, or attempts to monopolize, the interstate, territorial or foreign trade or commerce in an article of merchandise, so as to exclude all competitors, can it be said that the Supreme Court has yet held that such corporation cannot be reached under the Act? Certainly there is no such doctrine in the Sugar Trust Case, and there is a contrary doctrine in the Iron Pipe Case. In the Sugar Trust Case the Court expressly says: "The object was manifestly private gain in the *manufacture* of the commodity, but not through the *control* of interstate or foreign commerce." See citation above. And in the Iron Pipe Case the Court says: "If, therefore, an agreement or combination directly restrains not alone the *manufacture*, but the *purchase, sale, or exchange* of the manufactured commodity among the several States, it is brought within the provisions of the statute." See citation above. When, therefore, the further fact is recalled that the Act embraces any contract, combination in the form of trust or otherwise, or conspiracy, in restraint (reasonable or unreasonable) of interstate, territorial, or foreign trade or commerce; also any monopoly of any part of such interstate or foreign trade or commerce, and any attempt to monopolize the same; that section 2 of the Act indubitably applies to all corporations, and that the words "combination in [the] form of trust or otherwise," in sections 1 and 3 of the Act, according to the decision in *United States v. Trans-Missouri Freight Association*, *supra*, embrace a combination *in any form*, and therefore presumably a corporation,—the conclusion seems inevitable, that very sweeping legislation is already upon the statute-books. Would it not be wiser, therefore, in so delicate a matter, before new legislation is undertaken, and surely before an amendment to the Constitution is submitted to the people, to adopt the President's recommendation as to an appropriation, and ascertain, first, what can be done under the present Act? As yet, there is no authoritative decision.

Several minor cases, perhaps, may be referred to as of collateral interest. For example: It has been held that a person making a contract with a company or organization falling within the provisions of the Act is bound by such contract, and cannot escape from its obligations. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. Also that the company or organization is equally

bound. *Dickerman v. Northern Trust Co.*, 176 U. S. 181. But if the Act had specifically prohibited any remedy, *quære*, Whether the result would not have been different, so far, at least, as relates to interstate or foreign sales. The court, in *Connolly v. Union Sewer Pipe Co.*, *supra*, said: "If the Act of Congress expressly authorized one who purchased property from a combination, organized in violation of its provisions, to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. *But the Act contains no such provision*" (p. 552).

*Wm. F. Dana.*



## ESTOPPEL — PRINCIPAL AND AGENT.

WITH the kind consent of the Editor, I reply to a criticism of the HARVARD LAW REVIEW. The point has, through correspondence, been reduced to the following form:

A buyer has authority from a firm to purchase for cash only; it is the ordinary business custom for such a buyer to purchase upon credit; he buys upon credit (A) from an American dealer who is aware of the custom, (B) from a Patagonian just arrived who knows nothing of the custom. Under these circumstances, the HARVARD LAW REVIEW would say:

"It has, however, been pointed out<sup>1</sup> that where a third party makes a contract with an agent having apparent authority, the principal is bound, whether the party has knowledge of the usual course of business in question or not — whether he is misled by knowledge or ignorance." "But it is clear . . . that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority." Thus, in the one case (where there is knowledge) liability "rests upon agency or estoppel, whichever the third party may choose to invoke"; whereas in the other case (where there is ignorance) "the principal's liability can be accounted for only on the ground of agency."<sup>2</sup>

My contention, upon the contrary, is, that in neither case can there be liability upon the ground of agency; that only in the case of the American can there be liability at all; and that in that case it rests upon estoppel.

The HARVARD LAW REVIEW does not, in my opinion, sufficiently distinguish between real agency and the appearance of it, that is to say, between agency and no agency.

Our supposititious case affirms that the buyer had no authority to buy upon credit. Therefore the contracts which he made were outside his authority, in other words, outside his agency. If so, it would seem to be quite clear that the firm cannot be liable because of agency.

It may be said that there was the appearance of agency, and that the firm is liable because of that appearance. Very well, let us adhere to that. The firm is liable (if at all) not upon the ground

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<sup>1</sup> The Green Bag, Vol. 13, p. 50, criticising Ewart on Estoppel.

<sup>2</sup> 15 HARV. L. REV. 324.

of agency then, but upon the ground of the appearance of agency: that is, upon the ground of estoppel.

Now, to whom was there appearance of agency? The American may fairly claim that he was misled by the appearance. He knew the custom; he dealt upon the faith of it; he was ignorant of any special limitation of authority in the particular case; acting reasonably, he assumed the existence of agency; and he changed his position upon the faith of an appearance which to him spelled agency. But what about the Patagonian? To him there was no appearance of agency. Not being aware of the custom, he did not rely upon it; he did not deal upon the faith of it; its existence affected him in no way; for him it was non-existent; he cannot assert that he changed his position because of it—because of any appearance of agency. He cannot, therefore, succeed by estoppel; and as, *ex hypothesi*, there was no real agency, he cannot succeed at all.

Let us follow the course of the Patagonian's action at the trial. He proves the buyer's agency by putting in the written authority. This document specifically declares that the buyer shall have authority to buy for cash only. Proof is then given of a purchase upon credit. Verdict for defendant.

Or, after proving the written authority and the contract, the Patagonian proves that usually such buyers have authority to buy upon credit. Verdict for defendant.

Or, going a step further, he proves that the custom of intrusting such buyers with such authority is so general that persons aware of the custom would have been misled by the appearance of authority to buy upon credit. As for himself, he admits that he first heard of such custom from the previous witness, and that it had nothing to do with his contract. Verdict still, as I think, for defendant.

And the reason is clear: there was no authority to make the contract, but to some persons an appearance of authority only. There was no agency therefore, and no liability because of it. For estoppel, upon the other hand, it is not sufficient to allege that some people might under the same circumstances have been misled. You must say that the appearances misled you. The law is well stated by Irvine, C.:

“Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming

that such agent has authority to perform a particular act and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's work."<sup>1</sup>

The important question is

"What did such third person believe and have a right to believe as to the agent, from the acts of the principal?"<sup>2</sup>

The HARVARD LAW REVIEW, I venture to say, is not merely wrong when it says that

"It is clear that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority"; but it is confusing agency and no agency, and is misapplying terms.

For what is "agency within apparent authority," but agency beyond real authority? And agency beyond real authority of course is not agency at all. "Agency within apparent authority," then, is agency and no agency. In other words, the terms are as contradictory as if you said, "partnership within appearance of partnership," meaning partnership when there was no partnership; or "marriage within appearance of marriage," with a meaning that the criminal law might have occasion to explain to you.

And how can the same proof "create an estoppel" and at the same time "establish agency"? Estoppel exists, and can only exist, not where there is agency, but where there is none. If the evidence shows agency, that is an end of the case — the principal is bound. If it fails to prove agency, that may be the beginning of estoppel. It might as well be said that it requires the same proof to establish ratification as agency. Ratification happens only when there is no original agency to do the act. In both cases, estoppel and ratification, you prove the act done without authority (you do not prove agency, but no agency), and you then proceed to show why, nevertheless, you ought to succeed.<sup>3</sup>

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<sup>1</sup> *Johnson v. Milwaukee* (1895), 46 Neb. 480; 64 N. W. Rep. 1100; approved in *Holt v. Schneider* (1899), 77 N. W. Rep. 1086.

<sup>2</sup> *Heath v. Stoddart* (1898), 91 Me. 499; 40 Atl. Rep. 547.

<sup>3</sup> As Lord Cranworth says: You prove one thing *or* the other, — you "must show that the agency did exist and that the agent had the authority he assumed to exercise, *or otherwise* that the principal is estopped from disputing it." *Pole v. Leask* (1863), 33 L. J. Ch. 162.

But the REVIEW will reply that its allegation was that "it requires the same proof to create an estoppel as it does to establish agency *within apparent authority*." Very well, then the same proof will not prove estoppel and *real* agency. Is that admitted? No doubt the same evidence may prove estoppel and apparent, not real, agency, for the reason that proving apparent agency is a part of the proof of estoppel. If that is what is meant, little objection can be made to the sentence, except to the inaccuracy of its phraseology. For example, in the action brought by the American, the written authority shows that there was no real agency; and the plaintiff succeeds, not because the evidence established agency, but because, there being none, he proved the appearance of agency—he proved estoppel.

Possibly I may be confronted with such statements as this:

"The authority of an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him."<sup>1</sup>

Such language is frequently met with, but with submission it is either trivial or false. If it is meant as an assertion of the patent truism that a man cannot do two opposite things at the same moment,—give authority "to perform *all* things usual," and at the same time withhold authority to do *some* of those things,—it may be allowed to pass as true but jejune. But if it is intended as an assertion that a man cannot give any sort of authority that he pleases, and may not introduce into his power of attorney such ingenious inventions of authority and limitations of authority as may suit his whim or fancy, it is merely untrue.

You tell me that I cannot employ a buyer and give him authority to buy for cash only; and I protest that I can, and that the cases in hand are of that character. You tell me that I cannot employ, say, a floor-walker, and withhold from him authority to do those things which a floor-walker usually does. I admit that, if your assertion is merely that I cannot give a man *all* the authority of a floor-walker and at the same time not give him *some* of such authority. Omnipotence itself cannot do that. But if you mean that I cannot authorize a man to perform some of those duties usually performed by a floor-walker and not assign to him the rest of such duties, I protest again that nothing is more simple. You may tell me that in such a case I have not appointed a

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<sup>1</sup> Smith's Mer. Law, 10th ed. 140; Bryant v. Moore (1846), 26 Me. 84.

floor-walker at all. I reply that I did not say that I had. You suggest that if I authorized a man to perform the more conspicuous duties of a floor-walker, and withheld from him some authority which such an employee usually possessed, people would be misled by his appearance of wider authority than that really given to him. I agree: Yes, people may be misled by what I have done, and if so I may be bound; but not because I authorized the act (for I did not), and not therefore because of agency to do the act, but because of the appearance of agency, that is, by estoppel to deny it.

I may be confronted also with the declaration that

"The general rule is . . . that the agent is authorized to do whatever is usual to carry out the object of his agency."<sup>1</sup>

To which I reply that there is no rule of law as to the existence of matters of fact. It may quite properly be said that "generally the agent is authorized to do whatever," etc., but not that there is any general rule of law to that effect.

Or it may be said that

"A person who employs a broker must be supposed to give him authority to act as other brokers do."<sup>2</sup>

To this there is no objection, except when applied to cases in which the supposition would reverse the facts. For it is one thing to say that the employment of a broker (*simpliciter*) means intrusting him with usual powers; and quite a different thing to say that if the Court has before it a written power of attorney withholding some of these powers, nevertheless the "broker *must be supposed*" to have those very powers. Insert in the above quotation "unless restricted," and Story would agree with it; otherwise he would dissent.<sup>3</sup> In other words, employment to do an act will be interpreted to include a grant of medium powers;<sup>4</sup> unless, of course, such interpretation is precluded by the form of the instrument.<sup>5</sup> Law can be rationally administered without altering the facts.

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<sup>1</sup> 2 Benj. on Sales, § 945; quoting from *Reese v. Bates* (1897), 94 Va. 321; 26 S. E. Rep. 865.

<sup>2</sup> *Sutton v. Latham* (1839), 10 Ad. & E. 30; 8 L. J. Q. B. 210.

<sup>3</sup> Story on Agency, § 59. And see *Schuchardt v. Allens* (1863), 1 Wall. 369; *Belmont v. Talbot* (1899), 51 S. W. Rep. 588 (Ky.).

<sup>4</sup> See cases cited in Ewart on Estoppel, pp. 488-491.

<sup>5</sup> "It is true that when an agency is created by a written instrument the nature and extent of the authority must be ascertained from the instrument itself and cannot be enlarged by parol proof." *Cawthorn v. Lusk* (1892), 97 Ala. 674; 11 So. Rep. 731.

Returning now to our cases, it will be seen that the firm cannot be liable for purchases made upon credit upon the ground of agency; because there was no agency — no authority, to buy upon credit. The plaintiffs then must succeed, if at all, upon the ground of the appearance of agency, that is, upon the ground of estoppel. And the American will succeed and the Patagonian will fail.

Analogy may help us a little. Here are two persons who have widely represented themselves as partners, but in reality are not so related. Contracts are made by the real proprietor of the business, (A) with an American who knows of the representation, and, (B) with a Patagonian, just arrived, who knows nothing of it. Is the ostensible partner liable upon the contracts? These cases are not far removed from those which we have been considering, and there is no difference between them with respect to the point under discussion. And yet their usual method of treatment is very different. Few would suggest that in these partnership cases an appearance of authority to all Americans would be of the slightest help to the Patagonian.

Formerly and prior to the development of the principles of the law of estoppel the Patagonian would have been all right;<sup>1</sup> but now it is quite clear that the law is as declared by Mr. Justice Gray:

“A person who is not in fact a partner . . . cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. . . . But the rule of law is always the same, the one who has no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.”<sup>2</sup>

James, C. J., is to the same effect:

“The absence of a partnership in fact being established, it devolved on plaintiffs to show that, as to them, defendants were nevertheless partners by estoppel. It was essential to do this in order to show that the representation or acts upon which they relied to create the ostensible relation, occurred on or prior to the time of the transaction, and had come to the knowledge of the plaintiffs; otherwise it is clear that they could not have been affected or influenced thereby.”<sup>3</sup>

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<sup>1</sup> *Martin v. Gray* (1863), 14 C. B. N. S. 839.

<sup>2</sup> *Thompson v. First National Bank* (1883), 111 U. S. 535, 536.

<sup>3</sup> *Burrows v. Grover* (1897), 41 S. W. Rep. 822 (Tex.). See also *Hefner v. Palmer*, (1873), 67 Ill. 161; *Johnson v. Hurley* (1893), 115 Mo. 513; 22 S. W. Rep. 492; *Armstrong*

Contrast this law with the contention of the HARVARD LAW REVIEW when reduced, as I think, to its true effect, and observe the anomalies: "A person who is not a partner cannot be made liable upon contracts of the partnership, except" by estoppel. But a person who is not a principal may be liable upon the contract of a man who is not his agent, but a pretended agent only, upon the ground of agency.

Where there is no partnership the American would succeed by estoppel only. But where there is no agency, other than a pretended one, he would succeed upon "agency or estoppel whichever" he "may choose to invoke."

Where there is no partnership and nothing done, the Patagonian would fail; for he "did nothing on the faith of" the appearance of partnership. But where there is no agency, but a pretended one only, on the faith of any appearance, he would succeed "on the ground of agency."

It does not sound quite right. It is better to say that where there is no partnership, there is no liability upon the ground of partnership; where there is no agency, there is no liability upon the ground of agency; and where estoppel is claimed, the asserter of it must show that he, and not other people, have been misled by false appearances.

*John S. Ewart.*

WINNIPEG, CANADA.

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*v. Potter* (1894), 103 Mich. 409; 61 N. W. Rep. 657; *Marschall v. Aikin* (1897), 70 Mass. 3; 48 N. E. Rep. 845; *Atlanta v. Hunt* (1897), 100 Tenn. 94; 42 S. W. Rep. 483; *Thornton v. McDonald* (1899), 33 S. E. Rep. 680 (Ga.); *Pomeroy's Eq. Jur.* § 812. Mr. Bigelow says, "This is the true rule, though it has sometimes been supposed that all men may treat one as a partner who holds himself out as such." (On Estoppel, p. 565 n.) See also *Mechem on Agency*, § 84; *Ewart on Estoppel*, Chaps. 10 and 27.



## DISCOVERY IN MASSACHUSETTS.

## PART II.

## THE RIGHT TO QUALIFY ANSWERS.

BESIDES placing restrictions on the duty to answer, some of which have already been discussed,<sup>1</sup> the statute further protects a party by allowing him to introduce into his answer "any matter relevant to the issue to which the interrogatory relates."<sup>2</sup> This right, if skillfully used, may be a great protection; but the question arises as to the meaning of the word "issue" as used in the statute.

The original act provided that "the party interrogated may introduce into his answer any matter explanatory of his admissions or denials, if relevant to the interrogatory which he is answering, but not otherwise."<sup>3</sup>

Under this section the Court of Common Pleas ruled that in answering an interrogatory as to the making of a loan sued on, the defendant, admitting the making of the loan, could not introduce a statement that it was paid or settled.<sup>4</sup> The practical result, therefore, was that a dishonest plaintiff could force an honest defendant to admit the loan and then deny payment, and, as the defendant could not take the stand, he would lose his case unless he had a witness or some evidence of payment. In 1852, when the new act was revised,<sup>5</sup> the law was changed to its present form, already quoted, under which the court decided, in *Baxter v. Massasoit Ins. Co.*,<sup>6</sup> that a party, in answer to a question whether an insurance policy was filled out, might answer that it was filled out but never delivered. In the opinion Hoar, J., stated that "the issue to which the interrogatory relates" meant "the issue in the cause between 'the parties,'" and that issue was "whether a

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<sup>1</sup> Discovery in Massachusetts, Part I., 16 HARV. L. REV. 110.

<sup>2</sup> R. L., c. 173, § 60.

<sup>3</sup> St. 1851, c. 233, § 104.

<sup>4</sup> *Hand v. Hughes*, 14 Law Reporter, 393; and see *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320, at p. 324.

<sup>5</sup> St. 1852, c. 312, § 67.

<sup>6</sup> 13 Allen (Mass.) 320.

policy was made by the defendants as a contract or evidence of a contract, binding upon them;" and he cited *Williams v. Cheney*<sup>1</sup> in which the court had said that the statutes "secure to parties the right to make complete statements of all facts in relation to which they may be interrogated in any suit, and guard them against being compelled to make partial and garbled disclosures in answer to artfully contrived questions."

### THE USE OF INTERROGATORIES AT TRIAL.

"The party interrogated may require that the whole of the answers upon any one subject matter inquired of shall be read if a part of them is read; but if no part is read the party interrogated shall in no way avail himself of his examination or of the fact that he has been examined."<sup>2</sup>

The original provision<sup>3</sup> required that if any answers were read, all should be read if the party interrogated so desired. In the revision of 1852 this requirement was limited to "any one subject matter inquired of."<sup>4</sup> This clause is similar to the clause, "issue to which the interrogatory relates," already considered in connection with the right to qualify answers. In fact, Gray, C. J., in *Churchill v. Ricker*,<sup>5</sup> appears to have regarded the two clauses as having a single meaning. In *Demelman v. Burton*,<sup>6</sup> however, the court held that "any one subject matter inquired of" means that in a suit on a note in which the defendant denies both the signature and the consideration, the reading by the plaintiff at the trial of interrogatories and answers relating to the signature does not give the defendant a right to the reading of those relating to consideration. This case seems to show that the two clauses referred to do not have the same meaning, for although it may be possible to reconcile the decisions on the facts in *Demelman v. Burton*, and *Baxter v. Massasoit Ins. Co.*, the language above quoted from the latter case and from *Williams v. Cheney*, seems to exclude from

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<sup>1</sup> 3 Gray (Mass.) 215, at p. 220.

<sup>2</sup> R. L., c. 173, § 88. In *Shapleigh, et al. v. Burnap*, 14 Law Reporter, 576 (1851), two plaintiffs (partners) were interrogated separately, and the defendant put in evidence answers of one. Held, that the plaintiff could not put in answers of the other.

<sup>3</sup> St. 1851, c. 233, § 110; see Hall, *Mass. Prac.*, pp. 46-47.

<sup>4</sup> St. 1852, c. 312, § 73.

<sup>5</sup> 109 Mass. 209.

<sup>6</sup> 176 Mass. 363.

the "issue" clause the limited interpretation applied to the "subject matter" clause in *Demelman v. Burton*.

The practical result seems to be that if in a suit on a note the plaintiff asks the defendant whether he signed the note, the defendant may answer, "Yes, but there was no consideration for it," and if his answer is used at all, it must all be read; but if, to the question whether he signed the note, he answers "Yes," and then to a question whether there was any consideration for it he answers "No," the plaintiff may read the question and answer relative to the signing of the note, and omit that relating to the consideration, and the defendant cannot force the reading of his answer about consideration. In one case the test is the right to qualify answers; in the other the test is the matter of the interrogatory.

This result was evidently intended by the legislature of 1852, which enlarged the right to qualify answers and limited the right to force them into the evidence, and although the inability of parties to testify, which caused the enlargement of the right to qualify answers, has been removed, the practical result, above stated, of the two clauses referred to, seems still to be a fair one. The present reason for the rule of allowing answers of any matter relating to the issues raised by the pleadings, is that the interrogating party is not bound by the qualifying statements in the answer, and is not prevented from discrediting the party answering by offering the answer in evidence, and therefore it is reasonable to allow a party, within the bounds of relevancy, to say what he pleases in his answer in order to avoid the effect of skillful questions, especially as his answers are liable to be used in other suits as well as in that in which he is interrogated.<sup>1</sup> On the other hand, under the "subject matter" clause it seems fair that the court should say to a party, as in *Demelman v. Burton*, "You had a fair opportunity to tell your story in your own way in answer to each interrogatory, and having done so you cannot mix up the other party's case at the trial by forcing him to qualify your admissions when you failed to do it yourself."

#### THE ADMISSIBILITY OF ANSWERS IN EVIDENCE.

"The answer of a party to interrogatories filed may be read by the other party as evidence at the trial."<sup>2</sup>

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<sup>1</sup> See *Williams v. Cheney*, 3 Gray (Mass.) 215, at p. 220.

<sup>2</sup> R. L., c. 173, § 88.

This right is, of course, subject to the ordinary rules of evidence,<sup>1</sup> for, as already stated, a court cannot decide questions of evidence on a motion for answers to interrogatories. The fact that an interrogatory has been filed and answered, therefore, is no reason for its admission in evidence, and it cannot be read merely for the purpose of suggesting facts by getting in the question. As in the case of other admissions of a party, the question and answer together must have some legitimate bearing on the case.

In *Hope Mutual Ins. Co. v. Chapman*,<sup>2</sup> an action on a note, the answer set up the fact that the note was for a premium on a policy issued by the plaintiff company, and that, as the plaintiff company had failed to comply with certain statutes imposing conditions on its right to do business in Massachusetts, the note was void. The report of the case states that "the defendant offered interrogatories and answers of the plaintiffs thereto in which the plaintiffs state that the note in suit was given for a premium upon a policy." The plaintiff objected to the use of the answers as "stating the contents of the policy without the production of said policy," and the court sustained the objection on the ground that the attempt by a party thus to prove the contents of a document presumably in his own possession was a "clear violation of the familiar principle of law excluding parol evidence of the contents of a written paper." If the facts are correctly reported, the decision seems wrong. The details of the policy do not appear to have been material to the case, the fact that "a policy" was the consideration for the note being the defense. The admission of the plaintiffs, therefore, that a policy was the consideration, seems clearly competent, not because it is evidence, but because, like other admissions, it is an excuse for not offering evidence. The defendant in the case stated may have deserved his fate, but the court appears to have given a bad reason for disposing of a technical defense. If logically followed out, the language of the court would prevent the use of any admissions as to the contents of documents as primary evidence. The case has never been cited since in the reports and is not followed in practice.<sup>3</sup>

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<sup>1</sup> See, as to answers of joint parties, *Dole v. Woolridge*, 142 Mass. 161, at pp. 181-182.

<sup>2</sup> 6 Gray (Mass.) 75.

<sup>3</sup> See *Clarke v. Warwick Cycle Manuf. Co.*, 174 Mass. 434.

## THE DUTY OF THE COURT TO PROTECT THE RIGHT OF PRIVACY.

The broad principles of the right to privacy<sup>1</sup> underlie the statutes and decisions on discovery. Interference with this right under the sanction of the court should not be extended any farther than is absolutely necessary, and although it has been held in *Williams v. Cheney*<sup>2</sup> that answers to interrogatories in one suit may be used as admissions in another suit involving different issues, it seems that this must be taken with a qualification. A party's right is to discovery only for the purposes of the action in which discovery is sought. There is no right to discovery by statutory interrogatories for collateral purposes, and if a party interrogated, for reasonable cause, seeks before filing his answers to have their use restricted, it is submitted that he is entitled to protection, for the information disclosed under compulsion by the court must be considered as in its custody. There is nothing in the statutes which requires the entire contents of answers to be spread upon the court records and open to the inspection of the public. The interrogatories and answers are not part of the record,<sup>3</sup> but fall under the head of proof. The law<sup>4</sup> provides that "the answers shall be filed in the clerk's office," but an answer stating that full answers have been prepared and are ready to be delivered to the clerk under an order of secrecy directed to the clerk and to the interrogating party would seem to satisfy that statute if the facts justify such a course. No Massachusetts case has been found in which such an order of secrecy has been made; but the practice of making such orders appears to be established in the English courts in cases of discovery of confidential documents, and furnishes a reasonable solution of the problem of protecting one party as far as possible without depriving the other party of his undoubted right to discovery. The English form of order conditioned upon secrecy is given in a footnote;<sup>5</sup> it can be easily

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<sup>1</sup> For a discussion of these principles see 4 HARV. L. REV. 193.

<sup>2</sup> 3 Gray (Mass.) 215.

<sup>3</sup> *Storer v. White*, 7 Mass. 448.

<sup>4</sup> R. L., c. 173, § 59.

<sup>5</sup> The following form is given in Seton on Judgments and Orders, vol. i. 6th ed. (1901), at pp. 58-59: "And the Plt by his Counsel, undertaking not to use or give in evidence, or cause or willfully suffer to be used or given in evidence, the letters or writings hereinafter referred to, or any copies or copy, abstracts or abstract, extracts or extract, thereof or therefrom, or from any or either of them, or parol evidence of the contents thereof, or any or either of them, in any action or actions already commenced,

adapted to circumstances, and might be very important to the party who was compelled to give discovery if the case in which it was given was settled without trial.

### THE PENALTY FOR FAILURE TO ANSWER.

If a party neglects or refuses to answer, "the court may enter a nonsuit or default."<sup>1</sup> In *Baker v. Carpenter*,<sup>2</sup> the court decided that a party has an absolute right to obtain answers before trial, and that an error of the court in refusing to order answers is not cured by the opportunity to offer testimony at the trial on the point covered by the interrogatories. In view of this decision it seems that the court is bound to enter a nonsuit or default rather than allow a case to go to trial while a proper interrogatory, seasonably filed, remains unanswered.

After a nonsuit has been entered, nothing further remains to be done unless judgment in set-off is claimed; but in case of a default damages remain to be assessed, and the question arises of the relative standing of the parties. In many cases this is a question of no practical importance, as in cases where the assessment of damages is merely a matter of computation the clerk attends to it, and in other cases either the defendant does not ask to be heard or, if he does, the court usually hears him. It may not infrequently happen, however, that a defendant will prefer to suffer a default rather than answer interrogatories if he can be sure of a chance to be heard on the question of damages, as a matter of right and not merely of discretion. In the recent case of *Dalton-Ingersoll Co. v. Fiske*,<sup>3</sup> the court remarked that "a person defaulted has no standing in court except to move to take off the default." This remark has accentuated a doubt at the bar as to the standing of a defaulted party on the question of damages; but it is submitted that the re-

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or hereafter to be commenced, against the defendants, or any or either of them, or against them or any or either of them jointly with any other person or persons, or against the writer of said letters either alone or jointly with any other person or persons for any other purpose or purposes whatsoever collateral to this action; Let the defts . . . produce," etc. *Hopkinson v. Ld. Burghley*, 2 Ch. 447, following language in *Richardson v. Hastings*, 7 Beav. 354.

<sup>1</sup> R. L., c. 173, § 66.

<sup>2</sup> *Baker v. Carpenter*, 127 Mass. 226. The court, however, has discretion as to the time before trial at which discovery shall be given, *Stern v. Filene*, 14 Allen (Mass.) 9; and when an interrogatory is apparently of remote bearing on the case the discretion of the trial judge in refusing to order answer will be sustained. *Elliott v. Lyman*, 3 Allen (Mass.) 110.

<sup>3</sup> 175 Mass. 15, at p. 20.

mark quoted was intended to apply solely to the right of a defaulted party in regard to the cause of action, and not to the assessment of damages, no question of damages being before the court.

It seems always to have been accepted as law in Massachusetts that if a defendant comes into court after default and before judgment is entered, he has a right to be heard as to the assessment of damages.

In 1811, in the case of *Storer v. White*,<sup>1</sup> the court said:

"If after the default of the defendant, the plaintiff shall move to have a jury to enquire into the damages at the bar pursuant to the provision of the Statute of 1784, c. 28, sec. 7, or if without such motion the judge shall assess the damages; and in either case the judge shall admit illegal evidence on the question of damages, the party aggrieved may file his exceptions to the admission according to the proceedings in our courts; and the judge ought to allow the exceptions, that the party may have the opinion of the whole court thereon."<sup>2</sup>

The logical and reasonable view of a default is stated, in the Connecticut case of *Lamphear v. Buckingham*,<sup>3</sup> as follows:

"It admits the cause of action as alleged, in full, or to some extent, according to the nature of the action. As it admits all the material facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain without further inquiry, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damage to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry."

The statute which provides that "upon a default at any stage of the proceedings . . . the damages shall upon motion of either party be assessed by a jury,"<sup>4</sup> seems to insure each party a right to be heard before the jury.

It seems clear from the passages cited, which reflect the constant practice,<sup>5</sup> that a defendant after default in Massachusetts may insist

<sup>1</sup> 7 Mass. 448.

<sup>2</sup> See also *Parsons, C. J.*, in *Perry v. Goodwin*, 6 Mass. 498, at p. 499; *Folger v. Fields*, 12 Cush. (Mass.) 93, and *Devens, J.*, in *Russell v. Lathrop*, 117 Mass. 424.

<sup>3</sup> 33 Conn. 237, at p. 250.

<sup>4</sup> R. L., c. 173, § 54; see *Gallagher v. Silberstein*, 64 N. E. Rep. 402.

<sup>5</sup> See *Howe's Practice* (1834) 266, *Colby's Practice* (1846) 226, *Aldrich, Eq. Pl. & Pr.*, 2d ed. (1896) pp. 233-235. All of these authors were Massachusetts judges.

As to other states, see *Begg v. Whittier*, 48 Me. 314; *Parker v. Roberts*, 63 N. H. 431, at p. 434; *Webb v. Webb*, 16 Vt. 636; *Lamphear v. Buckingham*, 33 Conn. 237; *Shepard v. New Haven & Northampton Co.*, 45 Conn. 54, at p. 58; *Batchelder v. Bartholomew*, 44 Conn. 494.



on a hearing in damages, but he must come in and ask to be heard, and unless he does so the court may proceed without notice to him, although in practice he usually gets notice when the case is on the trial list.

If, however, any of the plaintiff's interrogatories, for failure to answer which the defendant was defaulted, relate to the question of damages, his right to be heard would seem to be subject to the discretion of the court. The reason for this is that, the damages being a part of the case, the plaintiff has a right to interrogate on that subject,<sup>1</sup> and if the defendant fails to answer, the only logical and reasonable course for the court is to refuse him a hearing and proceed *ex parte*. As the trial of the cause of action is eliminated by the default, however, it would seem a fair exercise of the discretion to give the defendant a further opportunity to answer before proceeding *ex parte*. So also the defendant even after default would seem to have a right to answers from the plaintiff to interrogatories relative to the mitigation of damages, and if the plaintiff fails to answer it would appear to be the court's duty to award merely nominal damages.

#### THE POWER TO ENFORCE ANSWER BY CONTEMPT PROCEEDINGS.

Assume that an *ex parte* hearing is not sufficient for the plaintiff, but that he needs discovery from the defendant for use at the *ex parte* hearing, as in a suit for breach of the defendant's agreement not to sell within a certain district, the defendant having peculiar knowledge of the damage done. Has the court power to force answers by process for contempt? Such power has probably never been used in Massachusetts in such a case, and it is an open question whether it exists, and whether the section which says that the court on failure of the interrogated party to answer "may enter a nonsuit or default"<sup>2</sup> is exclusive or merely permissive.

It may be said that, as the court has no authority to order discovery at law except by the statute which specifies its powers, these powers must be limited strictly by the wording of the statute which gives the power to "nonsuit or default." On the other

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<sup>1</sup> This statement has been disputed, but it seems the only reasonable construction of the statute giving the plaintiff a right to interrogate in support of his suit. R. L., c. 173, § 57. See *Harris v. Collett*, 26 Beavan, 222; *Pape v. Lister*, L. R., 6 Q. B. 242; *Wilts, etc., Co. v. Swindon Water Works Co.*, 20 W. R. 353.

<sup>2</sup> R. L., c. 173, § 66.

hand, the statutes giving the right to interrogate say that interrogatories "shall" be answered,<sup>1</sup> and give the court power to "order" answers, and R. L., Chapter 166, § 1, provides that the courts "shall have and exercise all the powers which may be necessary for the performance of their duties," and that they "may issue all . . . processes . . . which may be necessary or proper to carry into effect the powers granted to them." The statutory system of discovery was adopted as being more convenient than the system of discovery by bill in equity, and, as process for contempt is the regular method of compelling discovery in equity, a reasonable interpretation of the statutes providing for discovery at law appears to be that the court should have the usual power to enforce answers, and that the provision for a nonsuit or default gives an additional convenient power which would not exist in the absence of special provision.

This interpretation is strengthened by the fact that in the statutes extending the provisions for statutory interrogatories to the courts of Equity<sup>2</sup> and Probate,<sup>3</sup> the courts are given authority on failure of answers to enter "such order or decree as the case may require."

#### DISCOVERY IN EQUITY.

Bills for discovery are not common, and the subject has been discussed in but few Massachusetts cases, the most important one in recent years being that of *Post Co. v. Toledo, etc., R. R.*,<sup>4</sup> in which the court held that the resident Massachusetts officers of an Ohio corporation might be made parties to a bill by an Ohio creditor for discovery of the names and addresses of stockholders of the company, in order that the creditor might bring suit against them in Ohio to enforce their statutory liability for the corporate debts.

In the opinion in this case Field, C. J., intimated that the exercise of jurisdiction for discovery in equity in aid of actions or defenses at law might be affected by the statutes giving the right to file interrogatories at law. It would seem, however, that the conditions of practice, which give the defendant his costs in a bill for discovery,<sup>5</sup> and the fact that under ordinary circumstances the interrogatory statutes give parties all that they need, are sufficient

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<sup>1</sup> R. L., c. 173, § 59.

<sup>2</sup> R. L., c. 162, § 42.

<sup>3</sup> See R. L., c. 203, § 13.

<sup>4</sup> R. L., c. 159, § 16.

<sup>5</sup> 144 Mass. 341.

to deter counsel from resorting to equity without good cause. This being the case, any tendency of the court to discourage the exercise of its equity powers seems unfortunate, especially as equity practice in Massachusetts still suffers from the old traditions of limited jurisdiction.

In *Colgate v. Compagnie Francaise, etc.*,<sup>1</sup> Wallace, J., said:

"The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books, and writings in his possession or control. But it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle is more vigorously asserted by courts of equity than that they will not yield a jurisdiction once legitimately exercised, because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested in the court, it must remain there until the legislature shall abolish or limit it; for without some positive act the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. Story, Eq. 64. Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law."

#### CAN INTERROGATORIES FOR DISCOVERY BE INSERTED IN A BILL FOR RELIEF?

The question of equity practice relative to discovery which seems to call for special discussion is the question whether a plaintiff can still seek discovery as an incident in a bill for relief, — a question which has assumed some practical importance since the recent decision in *Pearson et al. v. Treadwell et al.*,<sup>2</sup> that an answer in equity to a bill for relief which does not contain a prayer for discovery is merely a pleading, and exceptions no longer lie to it for insufficiency. This decision has settled a doubtful point<sup>3</sup> in accordance with the general equity practice outside of Massachusetts as to answers not under oath. The practical effect of

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<sup>1</sup> 23 Fed. Rep. 82.

<sup>2</sup> 179 Mass. 462.

<sup>3</sup> Cf. Chancery Rules of 1884, XVI., XVII., XVIII., and XXI., 136 Mass. 606-607.

the decision, however, is to leave a plaintiff entirely dependent on his right to discovery to obtain admissions of formal matters and to define the issues;<sup>1</sup> and as interrogatories cannot be filed until after answer,<sup>2</sup> and an answer is not due until a month from the return day of the writ,<sup>3</sup> a plaintiff after filing his bill must wait a month and a half before he can begin to interrogate unless he is allowed to insert interrogatories in his bill. From the point of view of the court as well as of the plaintiff, such delay seems undesirable, especially as it seems probable that under the ruling in *Pearson v. Treadwell* answers in equity will gradually develop into mere general denials.

In 1883, however, a statute was passed providing that "an answer except to a bill for discovery only shall not be made under oath,"<sup>4</sup> and in *Amy v. Manning*,<sup>5</sup> Field, J. (later Chief Justice), said: "Since the passage of this statute (1883, c. 223), by the provisions of § 10, if the bill asks for relief, the answer cannot be sworn to, and discovery can only be had by interrogatories to the defendant as in actions at law." The ground for this view is the position of the word "only" and the use of the word "shall" in the clause above quoted from the statute. This clause, however, does not necessarily call for this construction; it is just as intelligible if construed as a direction that an oath is required only when discovery is prayed in the bill and then only to that part of the answer giving discovery. The construction here suggested may seem strained, but the following remarks seem to show that the legislature has made some straining necessary. If the view of Chief Justice Field was correct, then the clause in question had the effect of repealing the provision in the Public Statutes<sup>6</sup> which provided that "Discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

Since the passage of the Revised Laws of 1902, which re-enacted

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<sup>1</sup> Having been of counsel for the excepting party in *Pearson et al. v. Treadwell et al.*, the writer wishes to disclaim any intention of criticising that decision adversely; the object of the present discussion is merely to set forth clearly the present conditions of equity practice.

<sup>2</sup> R. L., c. 159, § 15.

<sup>3</sup> Chancery Rule VIII.

<sup>4</sup> St. 1883, c. 223, § 10.

<sup>5</sup> 149 Mass. 487, at p. 491. See also Aldrich, *Eq. Pl. & Pr.*, 2d ed., pp. 150, 365, and Gray, C. J., in *Abrend v. Odiorne*, 118 Mass. 261, at p. 269.

<sup>6</sup> P. S., c. 151, § 7. *Cf.* *Parker v. Simpson*, 62 N. E. Rep. 401, in which counsel attempted to raise the question, but the court declined to pass on it. See also *Bliss v. Parks*, 175 Mass. 539.

both the clauses above quoted,<sup>1</sup> it would seem that both clauses must be given equal force, and that the legislature answered the view of Chief Justice Field by providing that discovery may be sought in a bill for relief.

From the point of view of policy the practical importance of the right to seek discovery in a bill for relief is that the exercise of this right may go far toward preventing the growth of the practice of making non-committal answers. One great merit of equity pleading hitherto has been its specific character, for, as a learned judge once said to the writer: "A well-pleaded equity case tries itself on most points." The practice of making full and specific answers was the result of the requirement of sworn answers which were open to exception for insufficiency. Now that the requirement of an oath and the liability to exception are both removed, and under existing law statutory interrogatories cannot be filed until after answer, there appears to be nothing but traditional practice to prevent answers in equity from becoming mere general denials.<sup>2</sup> The insertion of interrogatories or a prayer for discovery in the bill, although it would have the undesirable result of lengthening the bill and answer, would yet counteract the tendency of defendants to put everything in issue, for a defendant would be less likely to deny in the pleading part of his answer what he would have to admit in his answer to the interrogating part.

It may be said that the combination of pleading and discovery in one answer tends to confusion in the law; but the law seems still to allow a plaintiff to call for both, and, in the absence of a more satisfactory provision, the duty to give both seems to afford a valuable protection to the present specific character of equity pleading in Massachusetts.

#### CAN A PARTY GET DISCOVERY BOTH BY BILL AND BY STATUTORY PROCESS IN THE SAME CASE?

If the foregoing remarks are sound, this question arises.

The first section of Chapter 159 of the Revised Laws, except so far as it is controlled by other sections, provides for all the usual

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<sup>1</sup> R. L., c. 159, § 12, provides that "discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

§ 13 provides that "an answer except to a bill for discovery only shall not be made under oath."

<sup>2</sup> Cf. 11 HARV. L. REV. 206, and Chancery Rule VII., 136 Mass. 604.

equity process, including that for discovery. Among the sections containing rules of procedure, appear the following:

SECTION 8. . . . "suits in equity may be commenced by bill or petition, . . . or . . . by a declaration in an action of contract or tort . . ."

SECTION 12. . . . "Discovery may be sought by inserting a prayer therefor in the bill, petition, or declaration, or by interrogatories."

SECTION 13. . . . "an answer except to a bill for discovery only shall not be made under oath . . . answers to interrogatories in a bill for discovery shall be made within such time as the court orders, and questions arising thereon shall be determined by the rules applicable to bills for discovery."

SECTION 15. "Either party may, at any time after the filing of the answer in a suit in equity, file interrogatories . . . in the manner and subject to the provisions of chapter one hundred and seventy-three relative to interrogatories in actions at law."

The above quotations seem to show that the statutory interrogatories are provided in addition to, and not in lieu of, discovery in equity, and that, therefore, a plaintiff may interrogate in his bill for relief, and a defendant may interrogate by cross bill for discovery, and on the coming in of the answer to the original bill each party may of right file further interrogatories under section 15. The second use of the word "or" in section 12 does not appear to give the court discretion to require an election between discovery under section 12 and discovery under section 15. Section 15 is specific in giving the absolute right to discovery after answer without regard to previous proceedings. Of course, the whole equity jurisdiction is to a certain extent discretionary; but this general doctrine is hardly intended to enable a court to exercise its discretion by denying to a party cumulative rights clearly given by statute.

Neither does the fact that, at a time when equity jurisprudence was unfamiliar in Massachusetts, equity procedure was expected to be superseded in practice by statutory procedure, affect the construction of the present statutes, for no intention appears in the statutes to abolish the equitable rules.

Again in equity neither party can file statutory interrogatories until after the answer to the bill is filed, whereas at law interrogatories may be filed by the plaintiff after entry and by the defendant after answer. This postponement of the plaintiff's right in equity has appeared ever since 1862.<sup>1</sup> The only intelligible reason for

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<sup>1</sup> St. 1862, c. 40.

this distinction between the right at law and in equity appears to be that the legislature in 1862, appreciating that under the existing equity practice some of the issues would be defined by the bill and sworn answer, postponed the plaintiff's right to statutory interrogatories in order to avoid the cumbering of the record and annoyance of the court and parties by questions as to matters which would be admitted in the answer to the bill, and in order to allow the statutory interrogatories to be directed to the issues as defined by the bill and answer, thus giving the right to discovery both by bill and interrogatories.

It may be said, perhaps justly, that a fair system does not require these cumulative rights, and that any second opportunity to interrogate should be at the discretion of the court. The subject might be regulated by rule of court, but, in the absence of such rule, the law seems to be as above stated.

The result of this discussion is that there is nothing in the statutes either requiring or authorizing the court to decline to exercise the equity jurisdiction in any case in which discovery is allowable under the general principles of equity procedure. This jurisdiction is entirely independent of the interrogatory statutes, and, *per contra*, the statutory jurisdiction for discovery, both at law and in equity, seems to be independent of the equity jurisdiction.

#### CONCLUSION.

In criticising the system I have expressed the constructive view of its logical development as distinguished from the destructive or literal view naturally pressed by all litigants who are inconveniently interrogated. There are, however, three general considerations of practical policy which call for careful administration of the system.

In the first place, if one party to a suit is compelled to disclose his knowledge of the details of a case, there is danger of subjecting him to the perjury of his opponent or his opponent's witnesses. Vice-Chancellor Wigram said: <sup>1</sup>

“Experience has shown — or (at least) courts of justice in this country act upon the principle — that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend.”

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<sup>1</sup> Wigram on Discovery, 1st Am. ed., p. 263.



This is a real danger, and is one of the strong reasons for the rule against merely fishing questions such as the one in *Wilson v. Webber* already discussed in the first part of this article.<sup>1</sup> Like other dangers, however, its force as a restrictive argument is limited, and it does not seem to furnish sufficient justification for illogical discrimination in rules as to specific discovery, as shown by the passage already quoted from Lord Langdale relative to the discovery of the names of witnesses.<sup>2</sup>

In the second place the courts in administering the system are called upon to face the danger of causing damage by allowing or enforcing unnecessary and unfair interference with privacy.<sup>3</sup> It is submitted that much may be done to obviate this danger by orders of secrecy under penalty of contempt or pecuniary liability, as already suggested in the discussion of the right to privacy.<sup>4</sup>

The third danger of the system is that of causing unreasonable and unnecessary annoyance and expense by requiring investigation before answer. This applies especially to large business concerns, and is constantly gaining in force as business becomes more systematically organized and labor subdivided so that the executive head of a concern has very little knowledge of details as to which he may be interrogated. As against corporations or large concerns which are subjected to so many personal injury cases, the system of discovery, if skillfully used, may be made very oppressive unless carefully administered by the courts.

The fact that the system may be abused in cases against corporations, however, is an incidental result which should not be allowed to obscure the value of the system in the general administration of justice. The question is how to administer the system so as to minimize its danger without destroying its value.

It is submitted that the way out of the difficulty lies first in the careful scrutiny of interrogatories and the requirement of specifications sufficient to show clearly the materiality and the reasonable necessity of the discovery sought. Under the older systems from which equity procedure developed, a party in seeking discovery made specific charges of evidence which his opponent was called upon to answer,<sup>5</sup> and this old requirement that the court shall be informed of the reasons for granting discovery furnishes a part of the solution of the problem of fair administration.

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<sup>1</sup> 16 HARV. L. REV. 114.

<sup>3</sup> Wigram on Discovery, pp. 2-3.

<sup>5</sup> See 11 HARV. L. REV. 208; *cf.* *ibid.* pp. 145-149.

<sup>2</sup> *Ibid.* p. 118.

<sup>4</sup> See p. 197, *supra*.

In the same way, if a party declines to answer interrogatories, the court should be fully informed by him of his reasons for not answering, and, if the objection is made that an unreasonable investigation would be necessary before answering, facts should be stated to show this.

The interest of the community in having an efficient system seems to call for logical application of rules along the lines indicated. The establishment of illogical arbitrary rules confuses the subject, not only for the present, but for the future, even under an altered system the construction of which would naturally be affected by the earlier practice.

It is hoped that some of these suggestions may be of use to the profession in dealing with this system. Its value to the practitioner lies mainly in the opportunity which it offers for eliminating matters of formal proof, and for assisting in establishing facts which are sometimes difficult of proof, as, for instance, the delivery of goods. Furthermore, the Commissioners of 1851, who suggested the statutory system, prophesied that it would help to prevent unjust defenses, and its practical value for this purpose is illustrated by two cases from the writer's experience. In one the defendant was put into a dilemma where he had to choose between definite written perjury in answer to interrogatories or the abandonment of his whole defense. He defaulted rather than answer the interrogatories, although he had not hesitated at oral perjury on the stand in the lower court before appeal. In the other an officer of a defendant corporation was interrogated at an early period in the case. At the trial the theory of defense outlined in his answers was abandoned for another, and cross-examination of him as a witness brought out the inconsistency between his sworn answers to interrogatories and his oral testimony. This inconsistency had a very material effect in discrediting his defense. The verdict was for the plaintiff.

*Frank W. Grinnell.*

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RIGHT OF PUBLIC SERVICE COMPANIES TO SERVE THEMSELVES. — A decision absolutely startling in its significance was rendered lately by the Supreme Court of Illinois. The Constitution of Illinois provides that "All elevators or warehouses where grain is stored for a compensation . . . are declared to be public warehouses." In 1896 the proprietors of nine large elevator companies in Chicago were enjoined from mixing their private grain with other grain stored in their elevators. While this case was on appeal the general assembly passed a law authorizing such mingling by owners of public elevators. When proceeded against for contempt in disregarding the injunction, the defendant set up this enabling act; but the court held that just as the original actions of the defendant were unconstitutional, so also was the enabling act of the assembly. *Hannah v. People*, 64 N. E. Rep. 776.

It is to be noted that the defendant was acting in two capacities, as a public warehouseman, and as a private dealer in grain; and the decision distinctly limits his right so to act. In spite of the apparent breadth of the doctrine advanced, the court could hardly hold that a railroad must not transport and sell its coal in competition with other coal companies; or that a telegraph company must not use its wires for its own messages; or that a water company must not supply water to a hotel which it owns. Yet there must be some limit to the right of a company in a public calling to foster its own interests in dependent private callings. Obviously the railroad could not always transport its own coal first when other coal was waiting, nor could the telegraph company keep its wires so busy that the public service would be seriously retarded.

Regarded in detail the principal case is somewhat peculiar. Had the legislature enacted what the court has decided, it would have been a valid exercise of the police power. See *Munn v. Illinois*, 94 U. S. 113. For the opportunity to commit fraud was peculiarly tempting, and no doubt the defendant could and did, as a warehouseman, give himself special privileges as a dealer in grain. But, strictly, a court of its own motion has no police powers, and the decision must be regarded as a most liberal construction of the constitutional declaration that the maintaining of grain elevators is a public calling. Even so, the decision is very strong because it is based, not on actual misconduct, but on the temptation thereto. This is certainly further than the law has yet gone in its regulation of public service companies, though it is not further than it may perhaps eventually go. For example Art. 17, § 5 of the Constitution of Pennsylvania forbids common carriers from engaging directly or indirectly in mining articles for transportation over their lines. As to the slight effect of this prohibition, see Report of the Industrial Commission, Vol. XIX, p. 447.

With regard to the service due to rivals — a topic closely connected with this case — the law apparently holds that if they come as rivals, to compete in the public calling, service may be refused. See *Petition of Philadelphia, M. & S. St. Ry. Co.*, 53 Atl. Rep. 191 (Supreme Court of Pennsylvania). But if they come as ordinary members of the public, they must be accommodated. See *Rogers Locomotive, etc., Works v. Erie R. R. Co.*, 20 N. J. Eq. 379. This is true, even though such service increases the efficiency of a dependent private calling carried on by the rival at the expense of a similar private calling of the defendant's. *People v. Hudson River Tel. Co.*, 19 Abb. N. C. (N. Y.) 466. On the other hand, it is not unjust discrimination for a railroad to carry supplies for its own eating-house free, while charging its rivals regular freight rates. *Kelly v. Chicago, etc., R. R. Co.*, 93 Ia. 436. Apparently the effect of the decision in the principal case will be to add a new limitation to the law of public service. Instead of being "Serve the public, and incidentally yourself," it will be "Serve the public, and incidentally yourself only if there is no strong temptation to prefer the latter service."

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ADMIRALTY JURISDICTION OVER TORTS. — A late decision in Hawaii fixes a new restriction upon the field of maritime tort. *Campbell v. H. Hackfeld & Co., Ltd.* (U. S. Dist. Ct. Hawaii, Oct. 21, 1902). The defendant corporation had contracted to unload a vessel lying within the navigable waters of the United States, and employed the plaintiff as a laborer in the undertaking. While working in the ship's hold, the plaintiff was injured by the defendant's negligence. The court held that, as the relation between the parties was not of a maritime nature, admiralty had no jurisdiction.

It has hitherto been considered settled law that admiralty jurisdiction over torts depends solely on the place where the tort is committed. See *The Plymouth*, 3 Wall. (U. S. Sup. Ct.) 20; *The Strabo*, 90 Fed. Rep. 110. In every instance which has been found, however, a maritime relation such as is required by the court in the principal case has in fact existed. The question of its necessity has, consequently, never before been actually decided. The novelty in the view of the court is that jurisdiction in torts, as in contracts, should extend only to cases in which the par-

ties are brought into relation with each other by reason of the fact that at least one of them is directly engaged in maritime affairs, representing a ship or her owners. It should be noted that the court proposes this test not as a substitute for the recognized one as to locality, but merely as a qualification upon it.

The chief arguments which suggest themselves in favor of the new doctrine are that it seems reasonable to restrict admiralty jurisdiction to matters which are in themselves of a maritime nature; that the new view is the result of a finer analysis of the nature of admiralty jurisdiction than has heretofore been made; and that, as indicated above, its adoption does not involve the actual overruling of previous decisions.

In considering these arguments, some investigation into the history of admiralty jurisdiction seems necessary. At the time of the Black Book, admiralty jurisdiction over both torts and contracts seems to have depended primarily on the place where the tort was committed or the contract made. See *De Lovio v. Boit*, 2 Gall. (U. S. Circ. Ct.) 398, 403 ff. In torts, this remained an undisputed test, and even in contracts efforts were made for a long time to restrict the jurisdiction by the same standard. *Bene v. Wilcocks*, Dyer, 159, n. 38. It was, however, finally recognized that the jurisdiction over contracts was, to some extent at least, independent of locality. *Anon.*, Winch 8. Cf. BENEDICT, ADM. PRAC., 3d ed., § 48. And that branch of the law by a gradual working away from the early locality test reached its present position, that jurisdiction depends on whether the transaction itself is of a maritime nature. *Insurance Co. v. Dunham*, 11 Wall. (U. S. Sup. Ct.) 1. The reason for this departure was, perhaps, the practical one that the locality test often gave undesirable results. Thus a court of admiralty should obviously have jurisdiction over charter-parties, even though made on land, whereas it is clearly impracticable for it to assume jurisdiction over a mortgage of realty merely because made at sea. Hence the original test of locality, being inappropriate to contracts, was discarded; but in torts, where its practical results were satisfactory, it was retained.

It is believed, therefore, that the doctrine of the principal case in qualifying the locality test as applied to torts, infringes a rule which originated in the very nature of admiralty jurisdiction, and which has been satisfactory in its practical operation. This test has been all but universally regarded as the sole one. See *The Plymouth*, *supra*. The single authority to the contrary is the somewhat obscurely stated *dictum* of a text-writer. BENEDICT, *supra*, § 308. The principal case seems, then, at variance with the spirit of the previous cases, even though reconcilable with the points actually decided. Not only would the adoption of its doctrine unsettle a rule which has long been assumed to be law, but it would make the question of jurisdiction over torts subject to the difficulty which so often perplexes cases of contract, namely, the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems therefore unfortunate as increasing complication and uncertainty in the law without, apparently, securing any practical gain to compensate for these disadvantages.

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CONSTITUTIONALITY OF STATE INTERFERENCE WITH CONTRACT RIGHTS OF A MUNICIPALITY. — The extent to which a state legislature may constitutionally interfere with the property and privileges of a municipal corporation, was recently brought into question in the Massachusetts courts. A

city, in granting the use of its streets to a street railway company, had imposed on the company the obligation of paving between its tracks. A state statute releasing this obligation, and substituting a money payment equal to the cost of paving, was held valid. *City of Springfield v. Springfield St. Ry. Co.*, 64 N. E. Rep. 577. It seems clear that the company, in accepting the license, given on condition that the paving be done, assumed a contractual duty to keep up this work, until the license should be withdrawn, or the city's power to continue it destroyed. That powers of this sort contained in a city charter, — and in fact that the charter itself may be revoked at the discretion of the legislature, is a well-settled general principle; for the city government is regarded as a local instrument of state sovereignty. *People v. Morris*, 13 Wend. (N. Y.) 325. But in the principal case the point was raised that the revocation of the power to continue the license resulted in the impairment of the obligation of contract. Despite the fact that the court dismissed this objection with slight discussion, it raises a somewhat intricate question.

As the charter powers of the city were in their nature revocable privileges and not grants, the attempt by the city to make them the basis of vested contract rights, was an unwarranted use of the privileges, so far as it tended to deprive the state of its power of revocation. To this extent the effort of the city to establish a permanent contract right upon a revocable license was a wrong upon the state, and the Federal Constitution could scarcely be invoked to maintain it. But even assuming this contract right to be valid and binding in every respect, the constitutional objection might be met upon a broader ground. The effect of the state statute was twofold: the right to sue upon the obligation was taken from the municipal corporation and given to the state for the benefit of the city's inhabitants; and the nature of the obligation itself was altered. The alleged impairment must be found, if at all, in one of these changes.

The power to take away the legal title to the obligation, and either exercise or transfer the right to sue upon it, must be included in the sovereign's power to destroy the municipal corporation as a legal entity. The position of the city would seem analogous to that of a trustee, who cannot complain that the right to sue upon a contract, made for the benefit of his *cestui que trust*, is transferred by the court to another trustee. Hence, so long as the interests of the inhabitants of the city are protected it would seem immaterial what agency exercises the protection.

The question then arises, did the substitution of one kind of obligation for another constitute an impairment? And the answer depends upon whether there was in the real nature of the inhabitants' rights in municipal property anything which would be violated by such a change. The opinion has been very ably advanced by some courts that municipal property is at the absolute disposal of the legislature. *Darlington v. The Mayor*, 31 N. Y. 164. It would follow from this that contract rights may be entirely destroyed by the legislature. *Cf. State of Md. v. Baltimore & Oh. R. R. Co.*, 12 Gill & Johns. (U. S. Sup. Ct.) 399. On the other hand, some decisions deny the right of the legislature to control municipal property acquired for purposes peculiarly local. *People v. Hurlbut*, 24 Mich. 44. On strict principle it is difficult to explain what vested rights the inhabitants of a city can possess in municipal property. Yet natural justice and the weight of authority make it clear that property which has been acquired at the expense of the community cannot be entirely taken away. But nearly all courts would agree that while the state cannot divert such property from the general purpose for



which it is held, yet it may exercise over it a large measure of control. See *Terret v. Taylor*, 9 Cranch (U. S. Sup. Ct.) 43, at 52. It would follow that no right of the inhabitants was violated in the principal case, by changing the form of the obligation, without altering its value or purpose. The statute was apparently analogous to a law changing the investment of trust funds. It would seem, therefore, that whether this right of the city be viewed as a wrongful product of a limited municipal power, or as a valid and lawful contractual right, the change which was made should not be regarded as unconstitutional.

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STATUS OF CUBA UNDER THE AMERICAN MILITARY GOVERNMENT. — A recent case deals with the question whether Cuba, when under our military government, was a "foreign country," not merely within the meaning of particular statutes, but in the full sense of the term. A murder was committed on the high seas on a ship registered at Havana under the American provisional government. The United States Circuit Court, before which the murderer was brought, held that it had no jurisdiction since the ship was "an extension of a foreign country." *United States v. Assia*, 28 N. Y. L. J. 433 (Circ. Ct., E. D. N. Y.).<sup>1</sup> The decision would seem to be clearly correct, and goes little beyond a holding of the Supreme Court that an act of Congress providing for extradition to "foreign countries" applied to Cuba. *Neely v. Henkel*, 180 U. S. 109.

These cases bring out strongly the American doctrine as to the effect of military occupation by the United States upon the status of the country occupied. The actual sovereignty of the United States over Cuba was complete; Spain had by treaty renounced all her rights, and there was scarcely a trace of a native Cuban government. The provisional government established by the President was complete in organization, and prepared for an indefinite existence. The old international doctrine would not have considered territory so held as "foreign," and subsequent modifications of that doctrine have not been fully accepted. See HALL, INTERNAT. LAW, 4th ed. 481. The peculiar character of our government, however, clearly necessitates the adoption of a different rule. International law requires assent by the incorporating state before incorporation is deemed complete, but allows each country to determine who shall have authority to represent it in giving such assent. In England this power is exercised by the Crown. Conquest and military occupation imply valid assent and make conquered territory part of the empire. *Campbell v. Hall*, 1 Cowper 204; see TAYLOR, INTERNAT. LAW 600; but also HALL, *supra*. In the United States, however, the power of assent is vested by the Constitution in the President and Congress. The President can exercise complete authority over territory under his military control. *New Orleans v. Steamship Co.*, 20 Wall (U. S. Sup. Ct.) 387. But he cannot without the co-operation of Congress incorporate such territory into the Union. *Fleming v. Page*, 9 How. (U. S. Sup. Ct.) 603; *Cross v. Harrison*, 16 *ibid.* 164. Under this strict division of powers the United States may well have full actual sovereignty over territory which remains foreign. It is true that such control imposes on the United States the usual responsibilities of the sovereign to other nations. The importance,

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<sup>1</sup> When the case appears in the regular reports it will be noted among Recent Cases in a subsequent issue.



nevertheless, of this distinction between territory under the control of the President and territory incorporated into the Union is manifestly far-reaching in other directions. The question of the insular cases as to the status of the islands expressly ceded to the United States by Spain under a treaty ratified by the Senate, is to be distinguished from that of the principal case.

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**TAXATION OF COSTS AGAINST PROSECUTING WITNESS.** — It is provided by statute in many states that, where certain criminal proceedings, instituted by the filing of a complaint, result in the acquittal of the accused, the good faith of the complainant may be determined in the finding; and if it be found that the prosecution was malicious or without reasonable cause, the magistrate shall enter judgment against the complainant for costs. In general, the constitutionality of such enactments has been admitted without dispute, and, when made the subject of decision, it has been supported, but on reasoning which is far from satisfactory. It is said that the effect of the statutes is to declare that an unwarranted appeal to the criminal law is itself a violation of the law, and that the prosecuting witness is on that account subject to the penalty of paying the costs of the proceedings. *In re Ebenhack*, 17 Kan. 618; *State v. Cannady*, 78 N. C. 539. But if this be the true view, it would seem that the complainant is deprived of his property without due process of law. He is not a party to the suit; he may be denied the right to be represented by counsel, and if permitted to introduce evidence at all, the most important evidence on the question as to whether he acted with reasonable cause, may be fatally objectionable in a trial, where the guilt of the accused is the principal issue. However, when the complaining witness is allowed an appeal, on which his justification for instituting the proceedings is the sole issue, these objections disappear. *State v. Smith*, 65 Wis. 93. A recent decision in Nebraska, where, as is common, an appeal is not allowed, points out the difficulties with the view adopted by courts supporting the statutes, and holds a similar statute unconstitutional. *Rickley v. State*, 91 N. W. Rep. 867.

It seems, nevertheless, that the validity of such enactments may be upheld on other grounds. There is no constitutional guaranty to an individual of a right to institute criminal proceedings. This, however, is not to be understood as a denial of the right of an individual to compel the state, through its officers, to institute a prosecution. When, therefore, the legislature permits prosecutions by complaint, it is within its prerogative to impose such conditions as it may see fit on the exercise of the right which it grants. On this view the statutes in question would not be unconstitutional even if they made the mere acquittal of the accused sufficient ground for the taxation of costs; and the specification that the proceedings must be found to have been unwarranted is but a further limitation which, for reasons of policy, the legislature has put upon the exercise of its full prerogative. The means, therefore, for the determination of the question whether the complainant acted reasonably and without malice can be specified as the legislature chooses; and the complainant cannot object that he is deprived of property without due process of law, when the costs are taxed on the finding in a suit to which he is not a real party.

An examination of the grounds on which costs are taxed against an unsuccessful party to a civil suit is instructive in this connection. Reasonable conditions may be attached to the exercise of the right to invoke

the protection of the courts in civil causes ; and it is but just that one who has brought an unsuccessful suit, or who has resisted a legal claim, should be required to pay the costs. PARSONS ON COSTS, 3. Similarly, the institution of criminal proceedings by an individual, when allowed, is a subject for proper regulation. It may be objected that the prosecuting witness is not a party to the suit, and so the analogy fails ; but it would seem that the civil suitor, in so far as the question of the taxation of costs against him is concerned, has no more brought himself before the court than has the prosecuting witness who files his complaint. But though the conditions attached to an appeal to the courts in matters of private right cannot be extended so as virtually to deprive the suitor of the courts' protection, the imposition of conditions on which the institution of criminal suits by individuals is permitted, finds its only limit in the same policy which moves the legislature to allow such a proceeding.

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CONTRACTS TO EMPLOY ONLY UNION LABOR. — A novel situation presented to the New York Supreme Court opens a wide field for discussion. A contractor had agreed to employ members of the plaintiff union and no others on all jobs of stone work of a certain character. This he failed to do, and the plaintiff moved for an injunction *pendente lite* to restrain him from employing other stone workers. The motion was dismissed on the ground that the plaintiff's damage was merely the loss of wages to its members and could be adequately estimated at law. *Stone, etc., Union v. Russell*, 38 N. Y. Misc. 513.

This statement as to the plaintiff's damages is certainly inaccurate. Whether or no the union does suffer a loss exactly corresponding to the loss of its members in wages — at least a doubtful question — it does lose prestige in addition. As the chief object of the agreement not to employ men outside the plaintiff union was to increase the union's influence and prestige, to allow the defendant to break this contract is completely to defeat the object for which it was made, and to cause injury for which a money compensation is quite inadequate. Of course the obvious retort is that in the analogous cases of libel and slander pecuniary compensation for injured reputation is considered sufficient. This is true, but the fact remains that oftentimes in reality it is *not* sufficient. However, after the holdings in *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, and *Roberson v. Rochester, etc., Co.*, 171 N. Y. 538, it was not open to this court to declare, with any show of consistency, that damage to a union's prestige could not be adequately recompensed at law. Another point in the plaintiff's favor is that an express negative stipulation was broken. Though this fact could hardly sway an American court, it would be well-nigh decisive in England. *Donnell v. Bennett*, L. R. 22 Ch. D. 835. But see 15 HARV. L. REV. 480.

Strong as the above considerations appear, the reasons on the other side are even more convincing. First, the unanimous weight of authority has held this sort of injury to be easily ascertainable and capable of adequate compensation at law. Second, there was nothing in the nature of the plaintiff's services or in the employment offered by the defendant so peculiar or unique as to demand the aid of equity. Third, a sound public policy requires that the parties be left to their rights at law. Such a contract as this has a direct tendency to stifle competition ; and though it could hardly be considered illegal as in restraint of trade, it is just the sort of dangerous agree-

ment which equity should refuse to enforce specifically. Its purpose was to coerce other workmen to join the union, thus interfering with their right to dispose of their labor to any one who was willing to employ. Every act which tends to limit the exercise of this right militates against the spirit of our government and is, *pro tanto*, detrimental to the public weal. See *Plant v. Woods*, 176 Mass. 492. As an attempt to compel unionizing, it is a contract which would be no defense to an action by a workman discharged in obedience to the agreement, whether or no his discharge included a breach of an employment contract. *Curran v. Galen*, 152 N. Y. 33; *Lucke v. Assembly*, 77 Md. 396. And see *Read v. Friendly Society, etc.*, 47 Sol. Jour. 23. Obviously this type of restrictive contract is not regarded with favor by the courts, and equity does wisely in refusing its extraordinary relief of specific performance. The result of the principal case therefore is sound, though the reasons advanced by the court are not in themselves conclusive.

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TENANT'S DECLARATIONS AS AFFECTING LANDLORD'S ACQUISITION OF TITLE BY ADVERSE POSSESSION. — A mortgagee of land to which the mortgagor had had no title foreclosed his mortgage, but took possession only through a tenant who entered under a verbal agreement to purchase. The tenant held for twenty years without carrying out this agreement, freely admitting to all the world in the meantime that the plaintiff was in fact the true owner. Subsequently the mortgagee conveyed to the defendant. It was held that the statements of the tenant were admissible in evidence in a suit by the true owner for the recovery of the land. *Walsh v. Wheelwright*, 96 Me. 174. The exact point raised in the case seems to be new. The court bases its decision largely upon the argument that the tenant's statements were admissible as being against his pecuniary interest. It is suggested, however, that the evidence might have been admitted without placing it under one of the exceptions to the rule against hearsay. In fact, the declarations of one in possession of land as to the character of the possession may be regarded as original evidence, for the reason that the very question in issue is whether there has been possession for the statutory period under a claim of right. Accordingly, testimony as to the claim made by the occupant is no less original evidence than is testimony as to the possession itself. GREENL. EV., 16th ed., §§ 108, 152 c, 189. Consequently, such statements are admitted when they are in the interest of the declarant as well as when they are against his interest; and it need not be shown that the declarant is dead or incapable of appearing as a witness. *Webb v. Richardson*, 42 Vt. 465; *Smith v. Putnam*, 62 N. H. 369.

So far as the technical rules of evidence are concerned, then, the statements of the tenant seem equally admissible whether they are considered original evidence or brought within an exception to the rule against hearsay. A more serious objection is raised, however, by the rule of substantive law that a tenant is estopped to deny his landlord's title. *Granger v. Parker*, 137 Mass. 228. It follows from this rule that if a tenant put in possession by a landlord who has no title occupies adversely to the true owner for the statutory period, the title which he gains accrues to the landlord; for the true owner is barred by the statute, and the tenant is estopped to claim title as against his landlord. Again, if the tenant wrongfully attorns to a stranger without bringing the fact to the landlord's notice, it would seem that the stranger can acquire no title by the tenant's possession, since he derives his

title through the tenant and is equally estopped from denying the landlord's title. *In re Emery and Barnett*, 4 C. B. N. S. 423, 431. The answer to this argument as applied to the principal case, however, is that the true owner does not claim against the landlord through the tenant, but by virtue of his own paramount title. Consequently he is not estopped from setting up the tenant's statements against the landlord. See *Russell v. Erwin's Adm'r*, 38 Ala. 44. This result, though reached on purely technical grounds, seems to be desirable, for in the majority of such cases the only possession which the true owner has reason to notice is the possession of the tenant, and so long as that possession is not adverse it does not seem just that he should lose his rights in the land.

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**THE DOCTRINE OF WAIVER IN INSURANCE LAW.** — Probably in no branch of the law are questions of waiver of so frequent occurrence or of so great practical importance as in insurance litigation. Speaking generally, the defense of waiver can be established only by showing a contract to waive or the existence of such circumstances as will furnish ground for an estoppel. In insurance cases this rule was stated at an early period, and prevails to-day in a few jurisdictions. *Merchants Mut. Ins. Co. v. Lacroix*, 45 Tex. 158; and see *Weidert v. State Ins. Co.*, 19 Ore. 261. The tendency of recent adjudications in such cases, however, is to allow a waiver, though there be no basis for it in contract or estoppel. *Titus v. Glen Falls Ins. Co.*, 81 N. Y. 410, overruling *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136. This has long been true in certain other branches of the law. Thus a surety who has been released because the creditor gave time to the principal debtor by agreement, revives his liability by acknowledging himself to be liable. *Hooper v. Pike*, 72 N. W. Rep. 829 (Minn.). An indorser of a bill of exchange, in a similar manner, by a promise to pay waives the defense created by the holder's failure to notify him of dishonor. *Segerson v. Mathews*, 20 How. (U. S. Sup. Ct.) 496. These decisions rest largely on their analogy to cases involving the waiver of the Statute of Limitations, where an unsupported promise has long been held sufficient. WOOD, LIMITATIONS, § 68. In all such cases the defenses waived have been raised by technical rules of law, the effect of which courts may well wish to avoid. An argument from these classes of cases to others must be made with caution. A line of decisions having a more direct bearing upon the insurance cases establishes the rule that the acceptance of rent which accrued after the forfeiture of a lease by breach of condition, waives the forfeiture. *Pennant's Case*, 3 Co. 64 a. The acceptance of rent is an acknowledgment of the existence of a lease; hence the lessor cannot later deny the lease without taking inconsistent positions.

The latest and most extreme expression of the view that waiver need not be based upon either contract or estoppel is found in an Indiana decision. *Germania Fire Ins. Co. v. Pitcher*, 64 N. E. Rep. 921 (Ind., Sup. Ct.). A fire insurance policy contained the condition that proof of loss must be made within sixty days after a fire. To establish a waiver of this condition the insured set up in replication that the company had based its refusal to pay the policy not upon the breach of the condition but upon a different ground. The court, in overruling a demurrer to this replication, stated that a refusal within the sixty day period would be a waiver *per se*. This point seems fairly well established, and correctly, since from the company's act

the insured is justified in assuming that a proof of loss would be useless. The court further held, however, that if the company's refusal occurred after the expiration of the sixty days there still would be waiver, since the refusal would be evidence of an actual intent to waive. No ground for an estoppel or contract was alleged and there was no opportunity for applying the rule against inconsistent positions, since the defendant company by its refusal not only did not recognize the policy as binding, but expressly denied all liability under it. The holding seems clearly to the effect that the mere expression of an actual intention to waive will without more establish a waiver.

Contracts of insurance in many respects are subject to special rules, the tendency of which is to favor the insured. It is in accord with this treatment to dispense with the strict technical requirements of a contract or of an estoppel as the basis of a waiver. In every case, however, where the court has found a waiver something in the nature of an estoppel has existed. See *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560. The principal case goes beyond this, and takes a position which on authority at least is apparently unjustifiable.

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**THE CONSTITUTIONAL PROHIBITION OF THE DELEGATION OF LEGISLATIVE POWER.** — The political movement in favor of the Referendum gives increasing importance to the question of the constitutional right of the legislature to submit proposed laws to popular vote. The desire of cities for a greater degree of self-government, and the growing distrust of legislatures as shown by the restrictions placed upon them in the later state constitutions, combine to increase the demand that the people be given direct control in law-making. The somewhat unsettled condition of the law on this point encourages the advocates of the reform to work under the present constitutions rather than to attempt to pass amendments. In a recent case an act limiting the compensation of the officers of a certain county was held void since it was to take effect only on approval by popular vote. *State v. Garver*, 64 N. E. 573 (Oh.). The Ohio Constitution expressly prohibits the legislature from passing laws to take effect on the approval of any further authority. Under that provision the Ohio courts make the cases turn largely on the wording of the acts; the law must be declared to be a complete and valid law on its passage, but its execution may be made dependent on a favorable vote of the people. *Cincinnati, etc., R. R. v. Commissioners of Clinton County*, 1 Oh. St. 77.

That a legislature may not delegate its law-making powers to any individual or body is well established as being a general principle implied if not expressed in all of our constitutions. See *Bradley v. Baxter*, 15 Barb. (N. Y.) 122. It may not let others pass upon a proposed law, nor may it, by a law which is itself complete, grant away the power to make laws. The legislators are said to be trustees for the people and to have no right to assign to others their high responsibility. Just what is covered by that expression is, however, uncertain. Both theory and precedent authorize the legislatures to clothe municipal corporations with powers of a local administrative nature and to submit to the voters of special districts matters of local government. Questions of municipal subscription for special improvements and questions as to the location of county seats are instances of such action. *Starin v. Town of Genoa*, 23 N. Y. 439; *Commonwealth v. Painter*, 10



Pa. St. 214; see 12 HARV. L. REV. 138. That is a delegation of power which the legislature might have exercised itself, yet it is clearly justifiable. The central authority has neither the time nor the special knowledge required to deal properly with the details of municipal rule. According to the weight of authority, the legislature may also enact a general law, as of local option, and leave the adoption of it in any district to a vote of the people of that district. *Locke's Appeal*, 72 Pa. St. 491. So too a statute may be passed to take effect on some future contingency other than the expression of approval by any authority. *Phoenix Ins. Co. v. Welch*, 29 Kan. 672. Attempts have been made to show a controlling analogy between one or more of these classes of cases and the Referendum in order to support the latter. *Smith v. City of Janesville*, 26 Wis. 291. There is a clear distinction, however, in the fact that in the former cases the law is complete on its passage by the legislature, while in the latter its existence as a law depends on the vote of the people. The general principle forbidding reference to the popular vote is well established, though there has been some confusion as to the exceptions mentioned. The latter should be analyzed and classified with greater care, but it is well to avoid hard and fast rules in this kind of question and to leave individual cases to the double discretion of the legislatures and the courts. This is a field, it should be noted, in which the courts will give the legislatures the full benefit of the presumption that their acts are constitutional.

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## RECENT CASES.

**ADMIRALTY — JURISDICTION OVER TORTS — NECESSITY OF MARITIME RELATIONS.** — The plaintiff was a laborer employed by the defendant, a firm of stevedores which had been engaged to unload a ship. While at work in the hold of the ship he was injured by the negligence of the defendant. *Held*, that the relation between the parties is not such as to give a court of admiralty jurisdiction. *Campbell v. Hackfeld & Co. Ltd.*, U. S. Dist. Ct., Hawaii, Oct. 21, 1902. See NOTES, p. 210.

**AGENCY — INCIDENTAL AUTHORITY — STREET RAILWAY CONDUCTOR.** — The plaintiff, while riding on the platform of a street car, contrary to the company's rules but with the permission of the conductor, was injured through the negligence of the company's employees. The jury found that the plaintiff was not negligent and had no notice of the rules. *Held*, that the plaintiff cannot recover as a passenger, since the conductor had no authority to carry him in that way. *Byrne v. Londonderry Tramway Co.*, [1902] 2 Ir. Rep. 457.

If the act of an agent is within the ordinary scope of employment of persons in a similar position, no express limitation of the agent's authority will exempt the principal from liability for such an act to a third party who has no notice of the limitation. *Byrne v. Massasoit Packing Co.*, 137 Mass. 313. Therefore the question whether the plaintiff in the principal case could become a passenger by reason of the conductor's permission to ride on the platform, must depend on whether it is incidental to and within the ordinary power of street car conductors to give such permission. An American court has answered this in the affirmative, in the case of one riding free on a car-driver's invitation. *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108. Similarly, one permitted to ride in a caboose, contrary to rules, is a passenger. *Creed v. Pa. R. R. Co.*, 86 Pa. St. 139. And arguing from the customs and the comfort and convenience of passengers, as well as from the usual practice of street railway companies, in this country at least, it would seem that reason, as well as direct authority and analogy, would point to a conclusion contrary to that in the principal case.

**AGENCY — PUBLIC OFFICERS — RAILROAD'S LIABILITY FOR LOSS OF MAIL.** — A mail package was lost through the negligence of an employee of a railroad company

which transported United States mail. *Held*, that the company is a public servant, and so not responsible to the owner of the package. *Bankers' Mutual Casualty Co. v. Minneapolis, St. P., S. S. M. Ry. Co.*, 117 Fed. Rep. 434 (C. C. A., Eighth Circ.).

A public officer is not ordinarily liable for the negligence of a subordinate official, even though appointed by him. *Dunlop v. Munroe*, 7 Cranch (U. S. Sup. Ct.) 242. On the other hand, where one employs a private servant in the performance of his public duties, his official position will not exempt him from liability for acts of his servant. *Ely v. Parsons*, 55 Conn. 83. This exemption from liability, where it exists, would seem to be based upon the fact that the subordinate, by his appointment, himself becomes an official, and like his superior an agent of the government. It would follow that the non-liability of the superior must depend upon the official position of his subordinate as well as of himself. Accordingly it has been held that a mail contractor is liable for the negligence of a carrier employed by him. *Sawyer v. Corse*, 17 Gratt. (Va.) 230. And it would seem that in the principal case the railroad should be liable, since its negligent employee, a switch tender, can hardly be regarded as a government official. The weight of authority, however, inclines slightly to the rule in the principal case. *Conwell v. Voorhees*, 13 Oh. 523; *Boston Ins. Co. v. Chicago, R. I. & P. Ry. Co.*, 92 N. W. Rep. 88 (Ia.).

**AGENCY — REVOCATION OF AUTHORITY — AUCTIONEER AND VENDEE.** — The defendant bid off a lot of land at auction, but refused to sign the contract of sale. The auctioneer signed as his agent. *Held*, that the vendee cannot revoke the auctioneer's authority to sign the memorandum of sale on his behalf. *Van Praagh v. Everidge*, [1902] 2 Ch. 266.

This decision covers a point on which there appears to be no previous authority. On principle it is difficult to support. A line of decisions beginning with *Emmerson v. Heelis*, 2 Taunt. 38, settles the law that by implication, at the fall of the hammer, the auctioneer becomes the vendee's agent to sign the memorandum of sale. This implied authority is limited to the time and place of the sale. *Hicks v. Whitmore*, 12 Wend. (N. Y.) 548. Why it is less revocable than a similar express authority does not appear. The only recognized classes of irrevocable agencies are those where the power is coupled with an interest or with an obligation. See *Hunt v. Rousmanier*, 8 Wheat. (U. S. Sup. Ct.) 201. The case where an agent acts for both parties to a sale is in itself anomalous, especially where, as here, the consent of one of the parties is not express but implied. It seems to carry the doctrine altogether too far to hold that the same relation may subsist when one of the parties has expressly repudiated the authority of the agent to act in his behalf.

**BANKRUPTCY — PETITION BY COMMITTEE OF A LUNATIC.** — A petition in bankruptcy was filed by the committee of a lunatic. *Held*, that the court has no jurisdiction to entertain such a petition. *In re Eisenberg*, 117 Fed. Rep. 786 (Dist. Ct., S. D. N. Y.). See 16 HARV. L. REV. 56.

**BANKRUPTCY — PROVABLE CLAIMS — CONVERSION OF CHATTELS.** — To an action for the conversion of chattels, a discharge in bankruptcy, under the Bankruptcy Act of 1898, was pleaded. Demurrer. *Held*, that the plea does not set forth a valid defense. *Watertown, etc., Co. v. Hall*, 75 N. Y. App. Div. 201.

The Bankruptcy Act enumerates, in § 63 *a*, provable debts, and provides in § 63 *b* that unliquidated debts may be liquidated and subsequently proved. It has been suggested that § 63 *b* is susceptible of being interpreted not as merely providing for the liquidation of debts previously enumerated in § 63 *a*, but as adding a new class of provable claims. COLLIER, BANKR., 3d ed., 385. This construction would allow the proof of all tort claims — a decided innovation. The principal case, apparently the first decision on the point, seems sound in repudiating it and will probably be followed. The Act of 1867, § 19, expressly provided for the proof of demands for the conversion of chattels. See *Hayes v. Nash*, 129 Mass. 62. But in the present act no such provision appears. However, a claim arising from a conversion which has resulted in the unjust enrichment of the bankrupt, and so gives rise to a quasi-contractual right, should be provable if the tort be waived, though in absence of such waiver, the injured party can subsequently sue in tort. See COLLIER, BANKR., 3d ed., 399; *Parker v. Norton*, 6 T. R. 695.

**CARRIERS — WHAT CONSTITUTES INTERSTATE TRAFFIC.** — An Act of Congress (27 Stat. c. 196, p. 531) provides that "it shall be unlawful for any common carrier" engaged in interstate commerce "to haul . . . on its line any car used in moving interstate traffic not equipped with" automatic couplers. The defendant operated between California and Utah passenger trains provided with dining-cars. A dining-car from



the eastbound train was drawn to a turn-table to get it in readiness for its westbound trip. *Held*, that during this time the car is not "used in moving interstate traffic." *Johnson v. Southern Pac. Co.*, 117 Fed. Rep. 462 (C. C. A., Eighth Circ.).

A conclusion similar to this was reached in *Norfolk, etc., R. R. Co. v. Commonwealth*, 93 Va. 749. Both this and the principal case, however, seem a misapplication of the well-settled doctrine of *Coe v. Errol*, 116 U. S. 517. That case decides that goods do not become subjects of interstate commerce until started on their ultimate passage from the original state to the state of destination. The principal case seems quite distinguishable. Part of the use of a dining-car "in moving interstate traffic" consists necessarily in turning it at terminal points. During this turning, therefore, it is as unequivocally appropriated to such use as during any other time. Lending support to this view, but not cited by the court, is a case holding that logs bound by river for another state do not lose their character as articles of interstate commerce though left, because of low water, for two years in an intermediate state. *Coe v. Errol*, 62 N. H. 303, approved *per* Bradley, J., in *Coe v. Errol*, 116 U. S. 517, 525. In the principal case Thayer, J., dissented from the majority on this question of "interstate traffic." The actual decision may be supported on two other grounds stated by the court as equally decisive in the defendant's favor.

**CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER — REFERENDUM.** — An act limiting the compensation of the officers of a certain county was passed by the legislature to take effect only if approved by the voters of that county at the next election. *Held*, that the act is a delegation of the legislative authority to make laws, and void under the State Constitution, Art. II, § 26. *State v. Garver*, 64 N. E. Rep. 573 (Oh.). See NOTES, p. 218.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COSTS TAXED AGAINST PROSECUTING WITNESS.** — A statute provides that when certain criminal proceedings are instituted on the complaint of a prosecuting witness, and the accused is acquitted, the good faith of the complainant may be determined in the finding; and if it is found that the prosecution was malicious or without reasonable cause, the magistrate shall enter judgment against the complainant for costs. *Held*, that the statute is unconstitutional as contravening the clause insuring due process of law. *Rickley v. State*, 91 N. W. 867 (Neb.). See NOTES, p. 214.

**CONSTITUTIONAL LAW — POLICE POWER — STATUTE FORBIDDING DISCHARGE OF EMPLOYEE BECAUSE MEMBER OF LABOR UNION.** — The defendant was committed for trial for violation of a statute of Wisconsin, Laws 1899, c. 332, which provided that "no person or corporation shall discharge an employee because he is a member of any labor organization." *Held*, that the statute violates the provision of the state constitution guaranteeing the rights of "life, liberty, and the pursuit of happiness." *State v. Kreutzberg*, 90 N. W. Rep. 1098 (Wis.).

Freedom of contract has always been subject to certain limitations. At common law the power is subject to the restrictions which forbid illegal contracts and regulate the dealings of public service companies. Moreover, even under the constitutions of the United States and of the several states, the legislature may in the exercise of its police power regulate the making of contracts by the enactment of such measures as are reasonably necessary for the welfare of the community. *People v. Jackson Road Co.*, 9 Mich. 285. Thus a statute limiting the hours of labor in an unhealthy occupation was sustained. *Holden v. Hardy*, 169 U. S. 366. Upon the other hand, a proposed law which should limit the hours of labor in all employments was considered unconstitutional. See *In Re Eight-Hour Law*, 21 Col. 29. As the legislation in the principal case can hardly be deemed necessary for the welfare of the community, the decision seems correct. Only three cases on the point have been found, two of which support the principal case. *State v. Julow*, 129 Mo. 163; *Gillespie v. People*, 188 Ill. 176; *contra*, *Davis v. State*, 30 W'kly L. Bul. (Ohio C. P.) 342. The same result would doubtless be reached under the Fourteenth Amendment. See COOLEY, PRIN. CONST. LAW, 258.

**CONSTITUTIONAL LAW — PUBLIC SERVICE COMPANIES — WAREHOUSEMEN STORING THEIR OWN GRAIN.** — The defendant, the manager of a grain elevator in Chicago, was enjoined from mingling grain of his own with other grain in the elevator. In proceedings for contempt for disobedience of the injunction he pleaded an act of the General Assembly purporting to authorize such mingling. *Held*, that the act is in conflict with the provision of the state constitution declaring all elevators where grain is stored for a compensation to be public warehouses. *Hannah v. People*, 64 N. E. Rep. 776 (Ill.). See NOTES, p. 209.

**CONSTITUTIONAL LAW — "SECTARIAN INSTRUCTION" — BIBLE READING IN SCHOOLS.** — A teacher during school hours read from the Bible and led in prayer and hymn singing. *Held*, that such exercises violate the provision of the state constitution prohibiting "sectarian instruction" in public schools, and also the provision that "No person shall be compelled to attend or support any place of worship." *State v. Scheve*, 91 N. W. Rep. 846 (Neb.).

This decision, the first under the Nebraska constitution, is in accord with the case nearest in point. *State v. District Board, etc.*, 76 Wis. 177; but see *Pfeiffer v. Board of Education*, 118 Mich. 560; *Donahoe v. Richards*, 38 Me. 379. The exclusion of the Bible as a book of religion from schools may be unfortunate, but is apparently required by the prohibition of "sectarian instruction." Reading from the Bible without exposition and in the King James version is an offense to Catholics as well as to Jews. The protests of these and smaller bodies, and the assertion of Protestants that the Bible is their most effective weapon, combine to support the decision. The framers of the constitution may not have considered the Bible "sectarian," but their intention should govern only the sense in which the word is used, not the application to particular books and teachings under different conditions. The manifold differences in doctrine, even ignoring scattering extremists, seem to make "sectarian" nearly equivalent to "religious." The further holding that the exercises described constituted the school a "place of worship" seems clearly unjustified, and would prevent religious exercises in all state institutions. See *Moore v. Monroe*, 64 Ia. 367; and cases cited *supra*.

**EQUITY — CANCELLATION OF VOID NOTE — ADEQUATE DEFENSE AT LAW.** — Under the Rev. St. of Illinois, 1899, c. 98, § 10, fraud exercised in obtaining the execution of a note may be pleaded in bar against all holders. The plaintiff's bill prayed for cancellation of such a note, alleging as an additional fact that attached to it was a power of attorney authorizing confession of judgment. *Held*, that on the ground of an adequate defense at law the bill will be dismissed. *Vanatta v. Lindley*, 64 N. E. Rep. 735 (Ill.).

The same question frequently arises in cases of forged instruments, or of notes paid at maturity but not surrendered. The view of the principal case, following *Black v. Miller*, 173 Ill. 489, has some support. *Winchester, etc., Co. v. Morse, etc., Co.*, 33 Fed. Rep. 170; see *Lewis v. Tobias*, 10 Cal. 574. The weight of authority is, however, *contra*. *Fuller v. Percival*, 126 Mass. 381; *Cooper v. Joel*, 27 Beav. 313. The simple and convincing ground underlying the latter decisions is that an instrument, though void, may be a source of subsequent vexatious litigation; and that the defense thereto, especially when affirmative, may be difficult to establish after lapse of time. It would seem, therefore, that equity jurisdiction should be exercised *quia timet*. See *Metler's Adm. v. Metler*, 18 N. J. Eq. 270, 273. In the principal case this ground may be urged with peculiar force because of the power of attorney authorizing confession of judgment. Where, on the other hand, an instrument is void on its face, there would in general be no reason for equitable relief. *Simpson v. Lord Howden*, 3 Myl. & C. 97; *Briggs v. Johnson*, 71 Me. 235. So also, if an action at law on the void instrument is already pending in the domestic courts, it would seem reasonable, in the absence of special circumstances, not to remove the case to a court of equity. See *McLin v. Marshall*, 1 Heisk. (Tenn.) 678; *Butler v. Durham*, 2 Ga. 413, 425.

**EQUITY — INJUNCTION — CONTRACT TO EMPLOY ONLY MEMBERS OF PARTICULAR LABOR UNION.** — A contractor agreed to employ members of a labor union, and no others, upon all his stone work of a certain character. The union prayed an injunction to restrain the contractor from breaking his agreement not to employ others. *Held*, that the injunction will not lie, as there is an adequate remedy at law. *Stone, etc., Union v. Russell*, 38 N. Y. Misc. 513. See NOTES, p. 215.

**EVIDENCE — DYING DECLARATION PARTIALLY INCOMPETENT.** — Upon trial of the defendant for homicide, a dying declaration made by the deceased was admitted in evidence. A part of this declaration would, if standing alone, have been inadmissible because it did not relate to the immediate circumstances of the killing. *Held*, that the whole declaration is properly admitted, subject to appropriate instructions to the jury by the court. *State v. Carter*, 107 La. 792.

Dying declarations, although hearsay, are admissible in a single class of cases, — prosecutions for homicide, where the declaration was made by the deceased in fear of death and concerning the circumstances of the killing. *The King v. Woodcock Case*, Leach, 3d ed. 563; 1 GREENL. EV. 16th ed., §§ 156, 156 a. Cf. *People v. Davis*, 56 N. Y. 95. Such declarations were formerly admitted more freely and sometimes even in civil cases. *Wright d. Clymer v. Littler*, 3 Burr. 1244, 1255; SWIFT, EV. 125. The modern

narrowing of the doctrine appears to indicate doubt on the part of the courts as to the credibility of such declarations and as to the practical expediency of allowing them to come before juries. The decision in the principal case is apparently at variance with the modern policy, since a jury, in spite of instructions, might often be influenced by the part of the declaration which is in itself incompetent. It would seem that the court might well entirely exclude such portions of the declaration, due care being had, of course, not to alter the meaning which the remainder bore in its original contest. The weight of authority also seems to support such a course. *Terrell v. Com.*, 13 Bush. (Ky.) 246; *State v. Wilson*, 121 Mo. 434.

**EVIDENCE—SELF-INCRIMINATION—PRODUCTION OF BOOKS BY BANKRUPT.**—A bankrupt on involuntary petition refused to file schedules and turn over books of account according to order of the bankruptcy court, alleging that their contents would tend to incriminate him. He was at the time under indictment in a state court for grand larceny. *Held*, that since it does not clearly appear that the evidence would not be incriminating, the bankrupt's refusal to furnish it does not render him punishable for contempt. *In re Kanter et al.*, 117 Fed. Rep. 356 (Dist. Ct., S. D. N. Y.). For a discussion of the question involved, see 13 HARV. L. REV. 296; 14 *ibid.* 461.

**INSURANCE—STANDARD POLICY—AVOIDED BY CLAUSE REGARDING REPAIRS.**—An insurance policy contained the provision that it should be void if mechanics should be employed in building, repairing, or altering the premises for more than fifteen consecutive days without the consent of the insurance company. Mechanics had been working on the building for the twenty-four days immediately preceding the fire. *Held*, that the policy was thereby avoided. *German Ins. Co. v. Hearne*, 117 Fed. Rep. 289 (C. C. A., Third Circ.).

The case is of interest because it is apparently the first time that a court has passed upon the clause in question. Although comparatively modern, this clause is very general, having been inserted in the statutory form of policy of many of the states. See *Smith v. German Ins. Co.*, 107 Mich. 270, 271; *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 305; RICHARDS, INS., pp. 584, 585. Hence the condition would appear to be generally considered a reasonable one; and, as its terms are clear and not open to reasonable misinterpretation, the principal case would seem to be correct in construing the clause strictly. See *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463. Formerly the more common form of the condition seems to have been that any repairs without the written consent of the company should render the policy void; but this was generally construed by the courts as not including small repairs or such as did not increase the risk. *Summerfield v. Phoenix Assur. Co.*, 65 Fed. Rep. 292; *James v. Lycoming Ins. Co.*, 13 Fed. Cas. 7, 182. A similar construction has been applied to the vacancy clauses. *Worley v. State Ins. Co.*, 91 Ia. 150; *Dennison v. Phoenix Ins. Co.*, 52 Ia. 457. While there is no exactly analogous decision, those most nearly in point would seem to support the principal case. *Newport Imp. Co. v. Home Ins. Co.*, 163 N. Y. 237.

**INSURANCE—WAIVER OF CONDITION.**—In a suit on an insurance policy the company set up as a defense the breach of a condition that proof of loss be furnished within sixty days. To establish a waiver the insurer replied that the company in its refusal to pay did not give the breach of condition as a reason therefor, but stated another ground. The company demurred. *Held*, that the demurrer must be sustained. *Germania Ins. Co. v. Pitcher*, 64 N. E. Rep. 921 (Ind., Sup. Ct.). See NOTES, p. 217.

**INTERNATIONAL LAW—STATUS OF CUBA DURING UNITED STATES MILITARY OCCUPATION.**—A murder was committed on a vessel sailing under a registry issued at Havana by the American military government. *Held*, that the United States courts have no jurisdiction over the offence, since the vessel was an extension of a "foreign country." *United States v. Assia*, 28 N. Y. L. J. 433 (Circ. Ct., E. D. N. Y.). See NOTES, p. 213.

**MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL—INTERFERENCE WITH CONTRACT RIGHTS.**—A city, in granting the use of its streets to a street railway company, had imposed on the company the obligation of paving between its tracks. A subsequent state statute released this obligation and substituted a money payment equal to the cost of the paving. *Held*, that this statute is not unconstitutional as impairing the obligation of a contract. *City of Springfield v. Springfield St. Ry. Co.*, 64 N. E. Rep. 577 (Mass.). See NOTES, p. 211.

**PROPERTY—ADVERSE POSSESSION—EFFECT OF TENANT'S ADMISSIONS.**—A mortgagee of land to which the mortgagor had had no title foreclosed his mortgage,

but took possession only through a tenant who entered under a verbal agreement to purchase. The tenant held for twenty years without carrying out this agreement, and during that time freely admitted to all the world that the plaintiff was in fact the true owner. Subsequently, the mortgagee conveyed to the defendant. *Held*, that the statements of the tenant are admissible in evidence in a suit by the plaintiff for the recovery of the land. *Walsh v. Wheelwright*, 96 Me. 174. See NOTES, p. 216.

**PROPERTY — ADVERSE POSSESSION — INTERRUPTION BY VIS MAJOR.** — The defendants took adverse possession of lands owned by the plaintiffs. Before the expiration of the statutory period for obtaining title by adverse possession the lands were submerged by a river. After the completion of the statutory period the lands formed again. The defendants regained possession. *Held*, that the adverse possession of the defendants was terminated by the submergence of the lands, the constructive possession then reverting to the plaintiffs. *Sec'y of State v. Krishnamoni Gupta*, 4 Bom. L. R. 537 (Eng., P. C.).

The case is peculiar in that during the latter part of the statutory period neither claimant had actual possession of the land, although the disseisor's abandonment was involuntary. But the rule of law appears to be strict in requiring that to acquire title by adverse possession the disseisor must have an actual and continuous possession. *Ward v. Cochran*, 150 U. S. 597; *Agency Co. v. Short*, L. R. 13 App. Cas. 793. Constructive possession cannot here avail the defendant, as he had not color of title to the whole coupled with an actual possession of a part. See *Bailey v. Carleton*, 12 N. H. 9. Nor is it material that the break in the continuity of the defendant's possession is due to an abandonment compelled by outside causes. See *Holliday v. Cromwell*, 37 Tex. 437. But such compulsory abandonment must be of more than a temporary duration. *McColgan v. Langford*, 6 Lea (Tenn.) 108, 116. On facts very similar to those in the principal case it was recently held that the running of the statutory period was at least suspended. *Western v. Flanagan*, 120 Mo. 61.

**PROPERTY — AGISTER'S LIEN — SURRENDER OF POSSESSION.** — The plaintiff had possession of certain cattle on which he held an agister's lien by statute. The defendants demanded possession by virtue of a subsequent chattel mortgage granted while the cattle were in the plaintiff's possession, and threatened to take them by force if necessary. The plaintiff, though asserting his lien, surrendered the cattle to the defendant. *Held*, that the plaintiff has not lost his lien and can replevy the cattle. *Becker v. Brown*, 91 N. W. Rep. 178 (Neb.).

At common law any voluntary surrender of possession destroyed the lien. *Jacobs v. Latour*, 2 M. & P. 201. How far statutory liens, now so general, are dependent upon the retention of possession by the lienor is a matter of dispute. In certain cases, for example, the landlord's lien on his tenant's crops, possession by the lienor is impossible. *Beall v. White*, 94 U. S. 382. So also where an absolute retention of possession would be inconsistent with the purposes of the bailment it is not required. *Smith v. Marden*, 60 N. H. 509; *Young v. Kimball*, 23 Pa. St. 193. But such possession as is not inconsistent must be retained. Thus the surrender of possession for an unnecessarily long period is held fatal. *Papineau v. Wentworth*, 136 Mass. 543. And as against an innocent mortgagee or purchaser of a horse while out of the possession of the livery stable keeper, the lien is also lost. *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66; *Vinal v. Spofford*, 139 Mass. 126, 130. But in the principal case absolute retention of possession was not inconsistent with the purposes of the bailment; and the statutes being in derogation of the common law should be strictly construed. See *Stone v. Kelley*, 59 Mo. App. 214, 218; *Robinson v. Kaplan*, 21 N. Y. Misc. 686, 688. It would seem therefore that the plaintiff waived his lien unless the surrender of possession can be considered involuntary, as the court suggested. See *Allen v. Spencer*, 1 Edm. Sel. Cas. (N. Y.) 117.

**PROPERTY — COVENANTS OF TITLE — RESCISSION FOR BREACH WHEN GRANTOR IS INSOLVENT.** — The defendant by deed containing the usual covenants of seisin and of warranty, purported to convey an estate in fee simple to the plaintiff. The defendant had in fact only a life estate. Later he became insolvent. *Held*, that the plaintiff is entitled to a decree rescinding the contract. *Matthews v. Crowder*, 69 S. W. Rep. 779 (Tenn.).

The court rests its decision on the co-existence of insolvency and an assumed breach of the covenant of warranty. Ordinarily, however, this covenant is held to be broken only when the grantee or his assignee has been lawfully evicted. *Bedeloe v. Wadsworth*, 21 Wend. (N. Y.) 120; see *Smith v. Jones*, 97 Ky. 670, *contra*. The few dissenting jurisdictions, of which Tennessee is not one, hold that the covenant of warranty represents and contains all the covenants for title. Since, under the general rule, there would have been no remedy at law in the principal case, there would seem to be no



basis for rescission. RAWLE, COVENANTS FOR TITLE, 5th ed., § 381. A second ground of decision, and upon this the case may be supported, is that the breach of the covenant of seisin and the defendant's insolvency are sufficient to support the plaintiff's bill. This covenant is usually regarded as an assurance of the right to convey the very estate described in the deed, and is therefore broken when made, if at all. See *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1. The subject-matter being land, the grantee may pursue his appropriate equitable remedy of rescission, if the grantor is insolvent. *Ingram v. Morgan*, 4 Humph. (Tenn.) 66.

PROPERTY — EXCEPTION BY LATER ELECTION. — The plaintiff by deed conveyed land to B in fee, to the use of B, excepting a road not less than forty feet in width, to be built from a certain point to the nearest road which should be constructed by B or his assignee. *Held*, that the exception is inoperative. *Savill Bros., Ltd. v. Bethell*, [1902] 2 Ch. 523 (C. A.).

The principal case establishes the rule in England that land excepted must be defined at the time of the execution of the deed. A *dictum* in accord is contained in *Pearce v. Watts*, L. R. 20 Eq. 492. Some American cases, however, permit the land excepted to be defined by the subsequent choice of either party. *Ex parte Branch*, 72 N. C. 106. A part of the whole parcel conveyed can be saved to the grantor by exception only, and not by reservation. *Douglas v. Lock*, 2 A. & E. 705. Accordingly, if the part excepted is to be defined at a future time, title to the whole must, until that time, remain in the grantor. This is possible only where the conveyance operates under the Statute of Uses. The retention of title is also contrary to the intention of the parties. By a sacrifice of principle some American courts have, as in reservation, given the grantee title to the whole at once. *Dygert v. Matthews*, 11 Wend. (N. Y.) 35. If the technical distinction between exception and reservation be disregarded, the exception by an election subsequent to the deed finds support in the general American doctrine that monuments erected after the conveyance control boundaries set by the deed. *Knowles v. Toothaker*, 58 Me. 172. Since in the principal case the conveyance operated at common law, the decision is clearly correct. It has, in addition, the practical advantage over the American rule that a final description of the land granted is found in the deed itself.

PROPERTY — LEASE OF WATER PRIVILEGE — ASSIGNEE'S LIABILITY FOR RENT. — By a contract in the form of a lease the plaintiff granted to B for a term of years the privilege of drawing from a certain canal sufficient water to fill B's pond during the ice-gathering season, the latter covenanting to pay a certain annual rent. B assigned his rights to the defendant. *Held*, that the transaction constitutes a lease, and that the defendant as assignee of the lessee is liable for the rent. *Jordan v. Water Co.*, 64 N. E. Rep. 680 (Ind., Sup. Ct.).

This decision is noticeable as a recognition of leases of incorporeal interests in land. Though the authorities, especially in America, are comparatively few, such leases have been recognized from early times. See *Bally v. Wells*, 3 Wils. 25; *Smith v. Simons*, 1 Root (Conn.) 318; WOODFALL, LANDLORD AND TENANT, 15th Eng. ed., 86-90. The case appears, also, to be the first American decision applying to leases of incorporeal interests the general rule that the assignee of a lessee is liable for the performance of the lessee's covenants. Whereas covenants running for or against land held in fee depend on the common law, the above rule as to covenants in leases was definitely established in England by the St. 32 Hen. VIII. c. 34; and in almost all the American states the provisions of that statute have in effect been re-enacted, or adopted as part of their common law. See SIMS, COVENANTS, 71-77. In England there appears to have been at first some doubt whether this statute applied to leases of incorporeal interests. See *Bally v. Wells*, *supra*, 26-33. It would seem, however, that by its very terms such cases are included; and in later decisions it has been so held. *Martyn v. Williams*, 1 H. & N. 817; see *Bally v. Wells*, *supra*; *Norval v. Pascoe*, 34 L. J. Ch. 82. Provisions similar to those of the English statute are in force in Indiana as common law. *Dawson v. Coffman*, 28 Ind. 220; *Carley v. Lewis*, 24 Ind. 23. The decision holding the assignee liable seems, therefore, sound.

PROPERTY — LIS PENDENS — APPLICATION TO PERSONALTY. — The plaintiff brought suit to foreclose a mortgage on the stock-in-trade and debts of A. B. While the suit was pending the mortgagor was adjudged insolvent; and the assignee was not made a party. After the plaintiff had obtained his decree, a debtor of the insolvent paid his debt to the assignee. The plaintiff applied for an order that the assignee should pay over the sum received in execution of the decree. *Held*, that the order shall not be made. *Mudalier v. Ayyangar*, 25 India L. R. (Mad. Ser.) 406.

That the doctrine of *lis pendens* does not apply to personal property, other than

chattels real, is now settled law in England. *Wigram v. Buckley*, [1894] 3 Ch. 483. But the reasons for applying the doctrine to cases of realty exist also in suits concerning personalty. Indeed, in the latter case the danger of defeating the decree of the court by transfer *pendente lite* is even greater. These reasons, however, seem to be outweighed by other considerations of policy. Of personalty, unlike real estate, the chief indication of title is possession; and to hold that *bona fide* purchasers should not be protected would be to run the danger of impairing the freedom of commercial transactions. On this reasoning the American courts unanimously refuse to apply the doctrine of *lis pendens* to cases of negotiable instruments. *Warren v. Marcy*, 97 U. S. 96. But the weight of authority is against extending the exception to include other kinds of personal property. *Carr v. Lewis Coal Co.*, 15 Mo. Ap. 551; *Thoms v. Southard*, 2 Dana (Ky.) 475. See *contra*, *Chase v. Searles*, 45 N. H. 511. The decision in the principal case was also rested upon the ground that the doctrine of *lis pendens* could not affect the assignee, since he is an involuntary transferee. This also is contrary to the weight of American authority. See BENNETT, *LIS PENDENS*, § 226.

PROPERTY — PROTECTION OF UNCOPYRIGHTED NEWS — PUBLICATION BY "TICKER." — The plaintiffs collected news by their telegraphic system and transmitted it to their tickers which were placed in brokers' offices, saloons, and hotels. The defendants appropriated such news from the plaintiffs' tickers and transmitted it to the tickers of their own customers. *Held*, that equity will restrain the defendants from publishing news thus obtained. *National, etc., Co. v. Western, etc., Co.*, 25 Nat. Corp. Rep. 352 (C. C. A., Seventh Circ., Oct., 1902).

The law recognizes and protects a property right in unpublished original "literary property," commonly including in the term artistic productions, knowledge, and news. *Palmer v. De Witt*, 47 N. Y. 532; *Rees v. Peltzer*, 75 Ill. 475. But after there has been an unqualified dedication to the public the only protection is by copyright. *Potter v. McPherson*, 21 Hun (N. Y.) 559. On the one hand the delivery of a lecture or the presentation of a play is not generally a sufficient publication. *Abernethy v. Hutchinson*, 1 Hall & T. 28. On the other, printing a book for public sale is so held. *Potter v. McPherson*, *supra*. No valid distinction between these cases apparently can be based on any difference of intention in the publication, or on any implied contract with the recipients, except perhaps in cases of publication to private subscribers. See *Kiernan v. Manhattan, etc., Co.*, 50 How. Prac. (N. Y.) 194. Nor will general accessibility prove a satisfactory test. It is suggested that a better distinction is whether the publication had been given out in so tangible a form that the public might generally possess the copies. See *Tribune Co. of Chicago v. Assoc. Press*, 116 Fed. Rep. 126. This would include in the protected class the principal case, which seems not to extend the law, but merely to apply it to a novel state of facts. But see *Kiernan v. Manhattan, etc., Co.*, *supra*.

PROPERTY — REVOCATION OF PAROL LICENSE — LICENSEE IN STATU QUO. — The plaintiff acting on a parol license constructed a ditch across the defendant's land; and upon the defendant tearing up part of it recovered damages for the entire cost of construction of the ditch. *Held*, that the plaintiff cannot by injunction compel the defendant to allow him to repair the ditch. *Oster v. Broe*, 64 N. E. Rep. 918 (Ind., Sup. Ct.).

The weight of authority holds that a parol license to do an act on the land of the licensor is revocable even when the licensee has incurred expense on the faith of such license. *Hodgkins v. Farrington*, 150 Mass. 19; *St. Louis, etc., Yards v. Wiggins, etc., Co.*, 112 Ill. 384. But in several of the states the more equitable doctrine prevails, that under such circumstances the license becomes irrevocable. *Wilson v. Chalfant*, 15 Ohio, 248; *Hodgson v. Jeffries*, 52 Ind. 334. The basis of this latter view is well illustrated by the principal case. When the licensee has recovered his expenditure, the parties stand in the same position as before the license was executed, and there is, therefore, no injustice in allowing the licensor to revoke. The point has been touched on before, but seems never to have been directly decided. See *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Lane v. Miller*, 27 Ind. 534. Two closely analogous decisions have been rendered to the effect that a license to erect a structure on the land of the licensor, though executed may be revoked if the structure has been destroyed. *Veghte v. Raritan, etc., Co.*, 19 N. J. Eq. 143; *Allen v. Fiske*, 42 Vt. 462. On principle the cases seem to be identical.

SALES — FRAUD OF AGENT — ESTOPPEL. — The plaintiff authorized a dock company to deliver the plaintiff's lumber to the orders of one C., the plaintiff's clerk, who had a limited authority to make sales. C fraudulently obtained transfers into the name of B., a fictitious person, and then in the character of B. sold the lumber to the defendant, who took without notice of the fraud. The plaintiff brings an action for



conversion. *Held*, that the plaintiff can recover. *Farquharson Bros. & Co. v. King & Co.*, [1902] A. C. 325. For a discussion of the contrary decision in the lower court, see 15 HARV. L. REV., 322.

STATUTE OF LIMITATIONS — WAIVER — DEBT INCLUDED IN SCHEDULE BY INSOLVENT. — A petitioner in insolvency included in his schedule of debts two debts barred by the Statute of Limitations. Later the petitioner filed a motion to expunge these claims. *Held*, that including the debts in the schedule acts as a waiver of the defense of the Statute. *In Re Gibson*, 69 S. W. Rep. 974 (Ind. T.).

To waive the defense of the Statute of Limitations a new promise to pay, express or implied, must be proved. *Bell v. Morrison*, 1 Pet. (U. S. Sup. Ct.) 351. An acknowledgment admitting the debt and a willingness to pay will raise the presumption of an implied promise. *Hall v. Bryan*, 50 Md. 194. But this may be rebutted by showing that there was no intention to promise to pay the debt. *Creuse v. Defiganier*, 10 Bosw. (N. Y.) 122. The weight of authority therefore, in opposition to the principal case, holds that the bankrupt's inclusion in his schedule of a debt barred by the Statute is insufficient to remove the statutory bar, for the debtor's intention in including every possible claim in his schedule, is to escape payment, not to promise to pay. *In Re Lipman*, 94 Fed. Rep. 353; *Hidden v. Consens*, 2 R. I. 401. Nor does this acknowledgment bind his assignees by raising an implied promise to pay out of his assets. *In Re Kingsley*, Fed. Cas. 7819. LOWELL, BANKR. § 212. The law should imply a promise only where the words will fairly bear that construction. The decision in the principal case, therefore, though supported to some slight extent, seems ill-considered. *In Re Hertzog*, Fed. Cas. 6433, accord.

TORTS — LEGAL CAUSE — INTERVENING NEGLIGENCE OF RAILROAD COMPANY. — The defendant railroad delivered a defective freight car to a connecting line. After a negligent inspection by the second company the car was put in use and an employee was injured by reason of the defect. *Held*, that the first company is not liable. *Missouri K. & T. Ry. Co. v. Merrill*, 70 Pac. Rep. 358 (Kan.).

As to the liability of the first company there is a sharp conflict of authority. *Fowles v. Briggs*, 116 Mich. 425, accord; *Teal v. Am. M. Co.*, 84 Minn. 320, *contra*. The principal case holds that no duty was owed by the first railroad to employees of the second. This conclusion is in keeping with most decisions in the analogous cases of the sale of manufactured articles. *Curtin v. Somerset*, 140 Pa. St. 70. On principle, however, it seems to be unsupportable. See 15 HARV. L. REV. 666. The court also relies, to some extent, upon the theory that the causal connection is broken by the intervention of a new wrongdoer. But if, under all the circumstances, the defendant was negligent, as the court assumes, it is difficult to see how he can escape liability. For in determining whether or not the defendant was negligent toward the plaintiff an important fact was the duty of subsequent inspection, and it would seem that in holding him negligent the jury must have considered that the second company's negligence was foreseeable. When an intervening negligent act can thus be anticipated the first wrongdoer should remain liable. *Lane v. Atlantic Works*, 111 Mass. 136, 140. Decisions opposing the principal case hold that there was no active intervention by the second company, but only a passive failure to divert a harmful force. *Teal v. Am. M. Co.*, *supra*. This distinction appears doubtful. Instead of a simple omission the wrong seems to have been an active use of a negligently inspected car.

TORTS — PRESUMPTION OF NEGLIGENCE — RES IPSA LOQUITUR. — A passenger who was injured by a collision between two railroad trains, brought an action against the company on whose train he was travelling. *Held*, that the burden is upon the defendant to disprove negligence. *Osgood v. Los Angeles Traction Co.*, 70 Pac. Rep. 169 (Cal.).

The case is supported by two decisions, in which, however, the point was apparently not important. *Central Pass., etc., Co. v. Kuhn*, 86 Ky. 578; *Little Rock, etc., Ry. Co. v. Harrell*, 58 Ark. 454. The doctrine of *res ipsa loquitur* is applied when the injury complained of is such a one as would not ordinarily occur unless the defendant were negligent. It is based primarily on probability and secondarily on considerations of expediency. *Scott v. London, etc., Docks*, 3 H. & C. 596; *Judson v. Powder Co.*, 107 Cal. 549. If nothing further appears than that the passenger was injured by an accident to the train on which he was riding, the rule may well be applied. *Gleason v. Virginia, etc., R. R. Co.*, 140 U. S. 435. But when the further fact is present that physical forces under the control of an independent party contributed materially to the result, it would seem that the presumption of negligence should not be raised. Neither on grounds of probability nor expediency would there seem to be sound reasons for

fixing the responsibility for the collision upon either railroad company until something more than the mere fact of the collision is shown. It is held that in such a case no presumption arises against the company which was not carrying the passenger injured. *Tompkins v. Railway*, 66 Cal. 163.

**TORTS — PROCURING BREACH OF CONTRACT — PERSONAL SERVICE.** — The defendant persuaded a travelling salesman, under contract with the plaintiff, to leave the plaintiff's employment and enter the service of the defendant. *Held*, that the defendant is not liable. *Brown Hardware Co. v. Ind. Stove Works*, 69 S. W. Rep. 805 (Tex., Civ. App.).

This case commits Texas to the minority view on this question. *Boulier v. Macaulley*, 91 Ky. 135, accord; *Lumley v. Gye*, 2 E. & B. 216; *Walker v. Cronin*, 107 Mass. 555; *contra*. But where the breach procured is of a contract involving no personal service the weight of authority refuses to allow recovery unless illegal means are used. *Boyson v. Thorn*, 98 Cal. 578; *contra*, *Jones v. Stanley*, 76 N. C. 355. There appears to be no valid reason for the distinction. The principle covering all such cases would seem to be, that any one intentionally causing pecuniary loss to another is *prima facie* liable. See *Vegelahn v. Guntner*, 167 Mass. 92, 106. Exactly what circumstances ought, on this theory, to be recognized as a justification must depend upon rather broad principles of justice and policy. Where the defendant procures a breach of contract, actuated merely by a desire to profit at the plaintiff's expense, his act would seem clearly unjustifiable. A contrary decision in the principal case, therefore, would be preferable.

**TRUSTS — BANK DEPOSIT FOR SPECIFIC PURPOSES.** — A sum was deposited by X in a bank with directions that at the end of six months the amount was to be paid to the plaintiff in monthly instalments. Before the expiration of the six months the bank became insolvent. *Held*, that although the bank was entitled under the contract to mix the deposit with its general funds, it was a trustee of the deposit and the plaintiff is therefore a preferred creditor. *Woodhouse v. Crandall*, 64 N. E. Rep. 292 (Ill.).

It is well settled that the relation arising from the ordinary deposit in a bank is that of debtor and creditor. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S. Sup. Ct.) 252; see *Foster v. Essex Bank*, 17 Mass. 479. It is equally clear that when the depository is not permitted to mingle the deposit with its general funds, the deposit is not an asset of the bank, and the depositor has a prior lien. *McLeod v. Evans*, 66 Wis. 401. Where a deposit is made with the understanding that it may be mingled with the general funds, but is to be applied according to an agreement, and not to be drawn upon by the depositor, the relation created is not purely that of debtor and creditor; and this fact has led some courts to assume, as in the principal case, that a trust relation is established. *Peak v. Ellicot*, 30 Kan. 156; see *People v. City Bank of Rochester*, 96 N. Y. 32. It is not, however, a strict trust, since there is no definite *res*. Therefore the rights of the depositor and beneficiary must be purely contractual, and it is difficult to see why their claim should be preferred above any other contract obligation of the bankrupt. The decision seems contrary to the better authority. *In re Hosie*, 7 Nat. Br. Reg. 601; *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261.

**TRUSTS — CONSTRUCTIVE TRUST — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER OF STOCK.** — The defendant, an innocent purchaser of a forged transfer of stock, presented it to the plaintiff corporation, which registered him as a shareholder. He subsequently transferred to an innocent purchaser for value, to whom the plaintiff issued certificates of registration. Neither the plaintiff nor the defendant was negligent. The plaintiff, being obliged to re-instate the original holder of the stock, sued the defendant for an indemnity. *Held*, that the plaintiff can recover. *Mayor, &c., of Sheffield v. Barclay, et al.*, 19 T. L. Rep. 2 (Eng., K. B.).

Where the first transferee had not transferred to a third party, it was held that he had no claim as a shareholder. *Simm v. Anglo-American Tel. Co.*, L. R. 5 Q. B. 188. And under similar circumstances it was decreed that he deliver up his certificates to be cancelled. *Hambleton & Co. v. Central Ohio Ry.*, 44 Md. 551. His subsequent transfer can manifestly make no difference as to his liability to bear the loss. The analogy is close to cases where, a prior endorsement having been forged on a bill of exchange, the drawee is allowed to recover the money paid. *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287. There, as in the principal case, the equities are not equal. The holder, having no title, has persuaded the drawee to pay money, or the corporation to incur a liability under a mistake of fact, without consideration. The money he has previously paid to a third party is consideration, not for the certificates or their proceeds, but for a piece of worthless paper. The fact that he has given value and received none should not entitle him to keep the plaintiff's money, for which it has received nothing. The

court seemed influenced by the doctrine, upon which the Massachusetts court based its decision in a similar case, that the plaintiff's right is based on an implied warranty of title. *Boston, etc., Co. v. Richardson*, 135 Mass. 473. This doctrine is unnecessary for the decision and seems unsupportable.

## BOOKS AND PERIODICALS.

**"OLD TIMES AT THE LAW SCHOOL."** — In the *Atlantic Monthly* for November Samuel F. Batchelder, LL.B., 1898, gives an extremely interesting account of the foundation of law instruction in Harvard University, and a brief history of the Law School from its beginning in 1817, to 1870, with an excellent characterization of the various members of the Law Faculty during that period.

The opening paragraphs call attention to the striking group picture of Isaac Royall and members of his family, and describe a bequest in Royall's will, executed in 1778, which endowed the first Professorship in Law in Harvard College. "In the middle of the line of pictures hanging between the delivery desks in the reading-room of the Harvard Law School is a striking group of three-quarter length figures that suggests a Copley, but is in reality the work of Feke, a young Newport Quaker of about a century ago. A stiff red-coated gentleman stands at a table surrounded by admiring female relatives. He is Isaac Royall, Brigadier-General of the Province of Massachusetts Bay, member of the Council, staunch upholder of King George. His magnificent old mansion in Medford is still standing, and of its owner it is comfortably recorded that 'no gentleman of his time gave better dinners or drank costlier wines.' But after the Battle of Lexington, like a good Tory, he followed the British to Halifax, and thence to England, where he died." The group portrait is described on the back of the canvas as follows: "drawn for Mr. Isaac Royall whose portrait is on the foreshide. Aged 22 years 13th inst. His Lady in blue. Aged 19 years 13th instant. Her sister Mrs. Mary Palmer in Red. Aged 18 years 22d of August. His Sister Penelope Royall in Green. Aged 19 years 25th of April. The Child, his Daughter Elizabeth 8 months 7th instant. Finished Sept. 15th 1741 by Robert Feke."

Royall's gift remained idle until 1815, when Isaac Parker, Chief Justice of Massachusetts, was appointed Royall Professor of Law. He held the position till 1827. In 1817 Professor Parker recommended to the Corporation the establishment of a school for the instruction of students at law under the patronage of the University. Accordingly the Corporation at a meeting held May 14, 1817, voted "that some counsellor, learned in the law, be elected to be denominated University Professor of Law; who shall reside in Cambridge, and open and keep a School for the Instruction of Graduates of this or any other University, and of such others, as, according to the rules of admission as Attorneys, may be admitted after five years' study in the office of some counsellor." The duties of the University Professor were outlined at this meeting, together with the privileges to be accorded to the students, and it was voted that the action of the Corporation be laid before the Overseers for their approval. This action of the Corporation marks the foundation of the Harvard Law School, a new department of the University. Hon. Asahel Stearns was chosen first University Professor.

The article gives a sketch of Professor Stearns, from which the following is taken: "Professor Stearns was much more than first University Professor of Law in the new School. He was the entire faculty. His office, in Harvard Square, was the School; and, as good Dr. Peabody sententiously remarks, 'a building, a library, and an organized faculty were essential to make the School attractive.' Some apologies for the first two were presently provided in a very old, low-studded building on the site of the present College House, where a so-called lecture-room, and an equally dubious library were fitted up. But the

number of law students rarely rose above eight or ten, and in 1829 had actually run down to one. At this stage Mr. Stearns naturally resigned."

A clear account is then given of the founding of the Dane Professorship, and of the condition named by the founder, Nathan Dane, namely, that Justice Joseph Story, of the United States Supreme Court, should be the first professor to fill the chair. "At the same time the Royall Professorship was filled by John H. Ashmun." Professor Ashmun died in 1833. He is described as perhaps the most brilliant figure in the whole history of the School. "The Royall Professorship, thus sadly vacated, was accepted by Simon Greenleaf, reporter of the Supreme Court of Maine."

"The School soon broadened into national reputation. In three years the need of better quarters became imperative, and again Mr. Dane came forward with a large contribution and a temporary loan of more." In 1832 Sumner wrote: "Dane Law College (situated just north of Reverend Mr. Newell's church), a beautiful Grecian temple with four Ionic pillars in front, — the most architectural and the best built edifice belonging to the college, was dedicated to the Law." "In 1845 the growth of the School required an addition to Dane Hall. Accordingly the long transverse portion of the present fabric was built and opened in 1845, with brilliant ceremonies." The Law School Circular of 1893 contains cuts showing the various changes made in the building from 1832 to 1883, when the School was removed to Austin Hall.

The following glimpse of Story in the lecture-room by G. W. Huston, L. S. 1843, is of great interest: "In the winter of '42 Mr. Webster and Lord Ashburton, accompanied by Lord Morpeth, were at Cambridge a length of time settling the Maine boundary question. These three men were in the habit of attending Judge Story's lectures, — access to the library being what brought them to Cambridge. After an exhaustive consideration of some point, when Judge Story had told what Lord Mansfield thought of it, and Chief Justice Marshall's opinion, and when Lord Morpeth had listened with his lips open and his heavy eyelids closed in a negative attitude, for he had inherited gout of many generations, Story would suddenly turn to the old Lord, sitting on a bench with the students, and inquire, 'and what is your opinion, my lord?' Morpeth would suddenly change his whole countenance, gather up his lips and his eyebrows, his eyes sparkling, and would deliver an exceedingly interesting opinion on the point under consideration." To this may be added the following, written of Story by an old alumnus of the School: "I often see him in my mind's eye, walking briskly into the recitation room when behind the hour; his white hat according so well with the white hairs (few in number) which it covered; his ruddy, shining face, sown with wrinkles of good humor, or smiles which seemed embedded in the skin. He would take his seat in a free and sociable manner, as though about commencing a pleasant *tête-à-tête* with the classes. In a moment all were attention. His thin gold spectacles would emerge from some mysterious hiding-place and jump upon his nose, soon to be removed and put on at pleasure, serving at times to accompany his hand in a graceful gesture. The book before him would open, and with it his small mouth — that threshold of legal wisdom guarded with perfect and regular teeth, through which issued words of fascination, sent out to lodge in many a haunt of memory. 'Who commences first, to-day?' inquired the Judge one morning. 'Mr. — or myself, — either you please,' replied a senior member. 'Ah!' replied the Judge, 'either is a very good answer except in the case where a justice in Ireland said to two men (one of whom was to be transported and the other executed), which of you is to be hanged?'

"Two portraits of Story hang in the School, both noticeable for the moonlike red face and its aspect of extraordinary benevolence." One of these portraits was painted by the famous artist William Page. He copied it from a portrait which he painted of the Judge five years earlier. He incorporated into this copy some important suggestions of Judge Story's son, Mr. William W. Story, and the copy proved more successful than the original. It was hung in Dane Hall, April 20, 1846. The funds to pay for the portrait were raised at the



suggestion of Professor Greenleaf by voluntary subscriptions of the students. The original subscription list signed by sixty-three students is in the Harvard Law Library.

Judge Story died in 1845, and Professor Greenleaf resigned in 1848, because of failing health, having performed almost all the work of the School from the death of Story. The Dane Professorship was then accepted by Theophilus Parsons, of Brookline. The Royall Professorship was filled in 1847 by the appointment of Joel Parker, Chief Justice of New Hampshire. In 1855 the University Professorship was revived by the exertions of Professor Parsons, who secured the appointment of Emory Washburn, of Worcester, who was at that time just quitting the Governorship of Massachusetts. Those who had the honor and privilege of knowing the last three named, Parsons, Parker, and Washburn, will not be content without reading all that Mr. Batchelder has said of them.

J. H. A.

**RIGHT OF MAJORITY STOCKHOLDERS TO TRANSFER ENTIRE CORPORATE PROPERTY.** — An important question bearing on the legality of combinations of capital is whether the majority of the stockholders of a prosperous private corporation have the right to transfer its entire property against the will of the minority. The American authorities upon the subject are collected and commented upon in a recent magazine article. *Right of a Private Corporation to transfer Property*, by Gordon Paxton, 8 Va. L. Reg. 1 (May, 1902). The writer found no decision recognizing this right. He states, however, that "while the courts have practically denied the power, they afford a very inadequate remedy against the formation of trusts, since no one can generally complain except a non-assenting stockholder," and he can usually be bought up. The article is to be commended for its very valuable collection and summary of authorities. But the author's conclusion that the law is in the unfortunate condition in which the violation of a right is recognized and yet no adequate remedy provided, seems inexact and suggests a possible misconception of the theoretical basis of the question.

Combinations of capital are usually effected by the creation of a new corporation to which several existing corporations transfer their entire property, receiving in exchange stock of the new company for distribution among their shareholders. Assuming the existence of a dissenting minority in any of the corporations thus consolidating, the legality of the transaction depends, in the first place, upon the authority conferred upon corporations by the state to transfer their entire property for such a purpose, and, secondly, upon the authority which the majority have received from the individual shareholders to represent them in such a matter. If the latter authority alone be denied, the non-assenting stockholders are obviously the only parties deserving a remedy. The cases collected by Mr. Paxton show that this hypothesis exists in fact, and they thus prove, contrary to his conclusion, that courts do give a remedy commensurate with the violation of the right in issue. The difficulty with his position seems to lie in a failure to recognize that the majority's right to act springs from the enumerated two sources.

Whether the power to transfer their entire property for purposes of combination has been impliedly conferred on corporations by the state, is a question rarely passed upon by the courts. The power has never been denied by actual decision. In the few cases where courts specifically considered the question, no large combination of capital was attempted and only private interests were involved. The decisions accordingly are not conclusive that such a power exists. Indeed language by courts is to be found where its existence appears to be denied. See *People v. Ballard*, 134 N. Y. 269.

To determine the extent of the implied authority conferred by the individual shareholders upon the majority, a business view must be taken as to the situation of the parties to the agreement of incorporation. In many respects the majority must be considered as empowered to act; for otherwise corporate business would be impossible. One clear limitation, however, is that the ma-

majority should act within the corporate powers; anything that the stockholders acting unanimously cannot do, *a fortiori* a mere majority cannot do. Certain other restrictions in regard to the alienation of the entire property are recognized. The transfer cannot be made in exchange for the stock of another corporation either to be held by the transferring corporation as an investment or to be distributed among its shareholders against the will of the minority. See *Byrne v. Schuyler Mfg. Co.*, 65 Conn. 336, and *Elyton Land Co. v. Dowdell*, 113 Ala. 177. Since transactions of this nature, as already stated, are the usual method of trust formation, it follows that a minority stockholder can generally prevent his corporation from entering the combination. The fact, however, that transfers in connection with objectionable transactions are not allowable does not negative the right to transfer the entire property if the transactions are unobjectionable. See TAYLOR, CORP., 3d ed., § 608. If a sale be made in open market for the purpose of distributing the net proceeds among the shareholders, the majority may be acting within their authority. From a business standpoint, the stockholders may well be regarded as stipulating in their contract of association that if a majority of them wish to wind up affairs and distribute cash this can be done without procuring the consent of each individual. The transaction in its objectionable form of receiving stock in payment would seem to come within such an authorization only if the non-assenting shareholder were given the option of a price equal to his proportionate part of the value of the net assets of the old corporation. Since generally this price could be determined only by an actual sale in open market, it would be extremely difficult to show that the option was in fact given in any particular case.

The dissenting stockholder's right to object to combination in the manner in which it is usually attempted seems therefore clearly established, and is based on a lack of authority in the majority to represent the minority in the objectionable transactions. Whether the state has a right to interfere on the ground that its sanction has not been given, is an open question; it is at least true that such a right has not been denied.

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**LIMITATIONS UPON MUNICIPAL TAXING POWER.** — A recent decision of the highest court of Virginia affirms the validity of a license tax of \$500 a year imposed upon proprietors of labor agencies by a municipal corporation under a general grant of taxing power, on the ground that the reasonableness of such a tax is not a judicial question. *Woodall v. City of Lynchburg*, 40 S. E. Rep. 915 (Va.). An interesting article in the Virginia Law Register contends that the municipality has no power to lay an unreasonable tax. The author further maintains that the legislature itself cannot impose upon a calling which it might not prohibit under the police power, a tax so great as to prevent one from following that calling; and that a municipality, since it derives its powers solely from the legislature, must be subject to the same limitation. *License Taxation by Municipal Corporations. Is the Power Unlimited in Virginia?* By Jno. G. Haythe, 8 Va. L. Reg. 13 (May, 1902).

It is thought, however, that the proposition that even the legislature itself has no power to levy a prohibitive tax, is not supported by the weight of authority. The author's argument is that the Constitution of Virginia (in common with the Federal Constitution) protects the citizen in his right to follow a lawful vocation, and that when the legislature attempts to prohibit such a calling under the guise of an exercise of the taxing power, the courts may interfere. The general rule is, however, that the courts will not impute a wrong motive to the legislature in exercising its admitted powers. *Veazie Bank v. Fenno*, 8 Wall (U. S. Sup. Ct.) 533; *State v. Harrington*, 68 Vt. 622. It will be presumed that the purpose was to raise revenue, not to destroy the occupation.

The author's position that a municipal corporation may not impose an unreasonable tax under a general grant of taxing power seems better taken. It may



be granted that if a tax directly imposed by the legislature is otherwise lawful, the courts cannot declare it void because it seems unreasonably large; for the determination of what is then a reasonable tax is for the legislature. The courts will not question the decision of a co-ordinate branch of the government upon that point. See opinion of Marshall, C. J., in *Providence Bank v. Billings and Pittman*, 4 Pet. (U. S. Sup. Ct.) 514, 563; *Spencer v. Merchant*, 125 U. S. 345, 355. But it does not follow that the courts may not determine the reasonableness of a municipal tax. A municipal corporation has only the powers granted to it by the legislature; and it will not be presumed that under a general grant of power the legislature meant to authorize an unreasonable ordinance. See *Paxson v. Sweet*, 13 N. J. Law 196. The courts, in determining the extent of the power granted, have generally held that a municipal ordinance passed in pursuance of a general power must be reasonable. *Bennett v. Borough of Birmingham*, 31 Pa. St. 15; COOLEY, CONST. LIM.,\* 200. Similarly, a power to license, unaccompanied by the power to tax, does not involve the right to tax, or to impose an unreasonable license fee. *The Laundry License Case*, 22 Fed. Rep. 701; *Ex parte Burnett*, 30 Ala. 461. It would seem that the same principles should apply to a general grant of taxing power, and that a municipal tax, to be valid, must be reasonable. COOLEY, TAXATION, 2d ed., pp. 597, 598. The presumption, however, is that the ordinance is reasonable unless clearly shown to be otherwise. *City of Burlington v. Putnam Ins. Co.*, 31 Ia. 102. On this narrow ground the decision of the Virginia court may possibly be supported, though the author's criticism of the reasoning seems just.

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A BRIEF FOR THE TRIAL OF CRIMINAL CASES. By Austin Abbott, assisted by William C. Beecher. Second edition. By the publishers' editorial staff. Rochester: The Lawyers' Co-operative Publishing Company. 1902. pp. xx, 814. 8vo.

In plan and arrangement, this volume shows little change from the first edition, which appeared in 1889 and was reviewed in these pages. 3 HARV. L. REV. 235. As was there observed, "the whole book is modelled on a brief. Principles are stated in clear, terse language, and in each case followed by a list of authorities." It is designed primarily to assist the practitioner in solving the difficulties that are likely to arise unexpectedly during trial. It follows that the questions dealt with are chiefly those of adjective law, — evidence, pleading, and procedure. Some questions as to constitutional rights are considered, but little effort is made to treat problems of substantive law, as the latter do not often present themselves suddenly and are, of course, comprehensively dealt with elsewhere. Nor, as the author remarked in his preface to the first edition, has he attempted "to give rulings on very peculiar and unusual points."

The division into fifty main heads adopted in the first edition has been preserved and one sub-head has been added, — The Examination of Witnesses. The scope of the work is further extended by the addition of new sections, — nearly one hundred in all, — which cover topics not considered in the first edition. The most noticeable change is in the number of citations of authorities, there being almost twice as many as in the previous volume. The gist of most of the cases cited is indicated by brief summaries in the nature of headnotes. The book, though confining itself chiefly to American authorities, represents nearly every jurisdiction in the United States, and also records many statutory modifications of the common law.

Despite the substantial additions, the publishers have avoided material increase in the bulk of the volume, — at the cost, however, of some sacrifice in the excellence of paper and of typography. The helpfulness of the "catchwords" at the top of each page has been somewhat diminished in that they are now restricted to the main heads into which the book is divided, instead of including also the titles of the various sections as in the former edition. Notwithstanding these slight imperfections, however, the increase in the number of subject-

treated and of authorities quoted and the introduction of cases decided since the publication of the first edition, give the present volume a practical value considerably greater than that of its predecessor.

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**A TREATISE UPON THE LAW OF COPYRIGHT** in the United Kingdom and the Dominions of the Crown and in the United States of America, containing a Full Appendix of all Acts of Parliament, International Conventions, Orders in Council, Treasury Minutes, and Acts of Congress now in Force. By E. J. MacGillivray. London: John Murray. New York: E. P. Dutton & Co. 1902. pp. xxxvi, 403. 8vo.

This work covers, briefly but with sufficient thoroughness, the whole field indicated by the title, with the single exception that the chapter on Colonial Copyright does not attempt to deal with the local legislation of the colonies, but merely with "the rights of a work published in one part of the British Dominions to receive protection in any other part of the British Dominions." There is also a chapter on International Copyright. The appendix contains the text of the statutes now in force in the United Kingdom and the United States, and the international conventions into which the former country has entered.

Although the author believes that the branch of the law with which he is dealing is defective in form and substance, he refrains from discussing what changes ought to be made and confines himself to setting forth the statute law, stating concisely the principles of the most significant cases in which it has been interpreted, and indicating very briefly his own opinion on doubtful points. The law of England and of America is treated in separate parts of the book, — an arrangement which the author amply justifies by referring to the differences in the statutes of the two countries. A work constructed in any other way is perhaps likely to prove a treatise on the law of one country with partial and deceptive illustrations from the other. It is not so clear why, within each part, the statutory protection of authors is treated before their common law rights. Though the latter topic is of very subordinate importance and of no more ancient origin than the former, it may be doubted whether logically it should not be given priority in order of treatment. Owing to the perplexing diversities of the English statutes, they receive a much more extended and analytic discussion than is accorded the American law. The work, as a whole, is a clear and interesting treatment of a difficult subject and a useful guide in a very obscure department of the law.

H. L. B.

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**PROBATE LAW.** By M. D. Chatterton. 2 vols. Lansing: Robert Smith Printing Co. 1901. pp. lxxvii, 1-460; v, 461-1117. 8vo.

Since the law and the procedure of the settlement of the estates of deceased persons are regulated largely by local statutes, it seems appropriate for an author to direct his attention primarily to the probate law of a particular state, provided he supplements and reinforces his exposition of the local law by frequent use of decisions rendered in other states. On the other hand, a general system of probate law has been developed, either entirely apart from statutes or merely by way of interpretation of statutory provisions, common to all jurisdictions. Consequently a general treatise used in conjunction with the statutes and the digests of any given state or edited with especial reference to the peculiar development of the law in that state, would perhaps satisfy all the needs of the profession.

The author of the present volumes, equipped for his work by eight years' experience as a probate judge in Michigan, has followed the former method, devoting himself to an exposition of the probate law of that state. Michigan has largely copied the probate laws of Massachusetts, and her statutes have in turn been the basis of subsequent legislation in Iowa, Kansas, Minnesota, and Nebraska, and especially in Wisconsin. Constant references are therefore

made to decisions in these states, so that the work, though prepared principally for Michigan practitioners, may yet be of some service in these other jurisdictions. Frequently also, for completeness of treatment, cases in still other states are cited. The author has made much use of the leading text-books, but he might wisely have referred to the latest editions rather than, for example, to the tenth edition of Greenleaf or the ninth of Kent. The various topics treated are arranged in the order in which they become pertinent in the course of probate proceedings. An extensive table of cases and a minute index two hundred and fifty pages in length are included in the volumes.

Intended primarily for the use of active practitioners, the work confines itself to a statement of the law and deals but sparingly with its theory. By analysis of a vast number of decisions and by subsequent synthesis the author has produced a legal digest in literary form in which almost every sentence is supported by judicial authority. The reader may however occasionally feel that some propositions are sustained only by *dicta*. The Michigan bar will undoubtedly find the work convenient for ready reference, and it will thus accomplish its evident purpose.

**THE GENERAL PRINCIPLES OF THE AMERICAN LAW OF THE SALE OF GOODS**, in the form of Rules with Comments and Illustrations, containing also the English "Sale of Goods Act." Second edition By Reuben M. Benjamin. Indianapolis and Kansas City: The Bowen-Merrill Company. 1901. pp. x, 401. 8vo.

This book—written by one whose name unfortunately is the same as that of another well-known writer on the same subject—is designed to state in a series of brief propositions, without criticism or suggestion, the law of Sales as it stands to-day. The usefulness of a work so planned must obviously depend not only on its accuracy and completeness, but also on its convenience for reference and its full citation of cases discussing the limits and qualifications of rules expressed in general terms. These latter requirements are well satisfied by following closely the order of the English Sale of Goods Act and by a careful and exhaustive grouping of decisions under the different clauses of each rule. The satisfactory index will be especially helpful to practitioners in making the contents of the book readily available.

The principal change made in the work by this second edition, apart from the insertion of recent cases, is the addition of a long chapter on "The Sale of Goods under the Statute of Frauds." The 17th section of the English Statute has been adopted in a majority of the states, and its importance is shown by the number of cases cited in the new chapter. Certain opportunities for further judicious enlargement, however, have been neglected. Mercantile Agents Acts are still disposed of in one sentence. The author's close adherence to his method of concise and rigid formulation even in branches where the law is confused or still developing is scarcely to be commended. It is somewhat misleading to have the law as to bills of lading stated with apparent certainty and completeness in a few inflexible rules.

**MORPHINISM AND NARCOMANIAS FROM OTHER DRUGS**, their Etiology, Treatment, and Medico-Legal Relations. By T. D. Crothers. Philadelphia and London: W. B. Saunders & Company. 1902. pp. 351. 8vo.

By far the greatest part of this very readable work is devoted to a discussion of morphinism and opium-taking. The author's conclusion, reached as a result of long observation and experience, that these diseases are on the increase in consequence of the extreme nervous tension incident to modern life, is entitled to serious consideration by lawyers no less than by physicians. Dr. Crothers points out that the morphinist is always to a certain extent an irresponsible person. He maintains that the statement of a confirmed user of the drug is

seldom entirely trustworthy, for the reason that even the creations of his fancy seem to him objective realities. In support of this proposition he records many interesting cases that have come within his own observation. While the information contained in the book probably would not enable the lawyer to determine with certainty whether a witness or a testator in a given case were a morphinist, it might help him to observe characteristics which would put him on inquiry. The book, though written primarily for the physician, is thus not without its value to the lawyer, and continued research along this line cannot fail to be of service to the legal profession.

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**PROBATE REPORTS ANNOTATED**, containing Recent Cases of General Value decided in the Courts of the Several States on Points of Probate Law, with Notes and References. By George A. Clement. Vol. VI. New York: Baker, Voorhis & Company. 1902. pp. xlv, 832 8vo.

The first five volumes of this useful series have already been noticed in these pages, the fifth having been reviewed in 15 HARV. L. REV. at p. 244. This sixth volume, following the plan of the earlier numbers, gathers in convenient and attractive form nearly one hundred recent probate decisions representing impartially about thirty-five jurisdictions and selected primarily to record the enunciation or recognition of new principles or the novel application of old principles. Valuable editorial notes containing full citations of relevant cases are interspersed throughout the work. Both cases and notes are rendered easily accessible for reference by separate and complete indexes. The practical efficiency of the series would perhaps be materially increased if from time to time a single general index were issued covering the subject-matter of all the volumes that had then appeared.

**THE NEGOTIABLE INSTRUMENTS LAW. A Review of the Ames-Brewster Controversy.** By Charles L. McKeehan. Reprinted from the American Law Register, Vol. 41, N. S., Nos. 8, 9, 10, August, September, October, 1902. pp. 84. 8vo.

**THE ORIGIN OF MUNICIPAL INCORPORATION IN ENGLAND AND IN THE UNITED STATES.** By Amasa M. Eaton. Reprinted from the Proceedings of the American Bar Association at Saratoga Springs, New York, August, 1902. pp. 81. 8vo.

**REPORT OF THE FOURTEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION**, held at Hot Springs of Virginia, August 5, 6, and 7, 1902. Edited by Eugene C. Massie. Richmond: Everett Waddey Co. 1902. pp. 341. 8vo.

**DIGEST OF GOVERNORS' MESSAGES, 1902**, including Related Topics in the President's Message, April 1, 1901, to April 1, 1902. N. Y. State Library Bulletin 76, Legislation 17. Edited by Robert H. Whitten. Albany: University of the State of New York. 1902. pp. 253-409. 8vo.

**CYCLOPEDIA OF LAW AND PROCEDURE.** Edited by William Mack and Howard P. Nash. Vol. V. New York: The American Law Book Company. London: Butterworth & Co. 1902. pp. 1118. 4to.

**ANNUAL ANNOTATIONS TO CYCLOPEDIA OF LAW AND PROCEDURE**, covering Vols. I-IV.

**A TREATISE ON THE LAW OF JUDGMENTS**, including the Doctrine of *Res Judicata*. By Henry Campbell Black. Second edition. 2 vols. St. Paul: West Publishing Company. San Francisco: Bancroft-Whitney Co. 1902. pp. ccii, 1-754; xvii, 755-1592. 8vo.

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## SOME OF THE RIGHTS OF TRADERS AND LABORERS.

**T**RADERS and laborers have some right in their trades or callings which others cannot lawfully infringe. The extent of the right is the subject of much dispute, and is not very satisfactorily defined by the decisions. This is due in part to the fact that many of the cases deal with the subject from the standpoint of the wrong done by the defendant, and not from that of the right possessed by the plaintiff. Obviously, if there is a wrong, it is because the plaintiff has some right; and this must be susceptible of a definition.

The right of a person to the enjoyment of his own land and chattels without unjustifiable interference, has been recognized and confirmed so often by decisions that we speak of it as axiomatic; yet there was a time when it was thought necessary to demonstrate its existence, and to define it. If there is any parallel right to the enjoyment of a person's trade or labor, many will not concede it to-day without a demonstration. There are numerous decisions containing definitions of this right, but in most of them the definitions are not very much superior to *dicta*, as in almost every case the decision may be justified by some line of reasoning which is no more the subject of dispute than is the right asserted.

Nevertheless these *dicta* have been so often repeated, particularly in the last few years, that they warrant the assertion that a person has a right to freedom from interference in the exercise of his trade or labor, — a concrete right as distinct as his right to his

lands and chattels, one which imposes on his fellows a correlative duty, the breach of which is a tort, and, therefore, actionable.

The subject has received such careful consideration within recent years, that it is fair to assume that such early authorities as exist have come to view. Those generally cited do not define the extent of the right, but the absence of early authority is the absence of this much authority, that the right does not exist. There are many common law rights as to which the first decisions are comparatively recent, though it is true that most of these are far less fundamental than the one now in question.

Certain interference is generally conceded to be tortious to the trader, namely, interference by an act which apart from the fact that it may or may not be a tort to him is unlawful intrinsically. Thus, to assault his intending customers, if it does intended damage to the trader, is a tort to him;<sup>1</sup> and it would seem that the threat of an assault would be the same. There has been some attempt to place in this same class the cases commonly grouped under the description of unfair competition, such as the simulation of trade devices. These usually involve a tort apart from their effect upon the trader, namely, a deceit to the customer. However, too strong an argument should not be drawn from these cases, as it is possible that they are not a recognition of the right now in question, but merely of the right to good will, or some right analogous thereto, in the nature of incorporeal property. The right to freedom from interference is more nearly one of liberty than of property, — the liberty to acquire property. It can scarcely be treated as good will, although there are suggestions of an analogy;<sup>2</sup> for it exists when the trader or laborer begins his business or occupation, whereas good will is something manufactured by a previous effort in the particular trade.

The early cases do not establish clearly that it is a tort to the plaintiff to interfere with his trade or labor by means even of a tort to his intending customers or employees unless this instrumental tort is a violent one. In *Garret v. Taylor*,<sup>3</sup> the means of interference was the threat of an assault, and also the threat of the institution of groundless suits against the plaintiff's workmen. It is not certain that the court would have regarded the latter means alone as affording the plaintiff a right of action. Even this means,

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<sup>1</sup> *Garret v. Taylor*, Cro. Jac. 567; *Tarleton v. M'Gawley*, Peake N. P. 270.

<sup>2</sup> *Hawkins* in *Allen v. Flood*, [1898] A. C. 1.

<sup>3</sup> Cro. Jac. 567.



Mr. Chalmers-Hunt suggests, may have been unlawful because a contempt of court.<sup>1</sup> In *Tarleton v. M'Gawley*,<sup>2</sup> the act complained of consisted of firing on intending customers, not merely a tort, but an act of violence to the customers.

These early cases are valuable chiefly because they decide that a man's right to pursue his established trade does impose on his fellows some duty of forbearance. Perhaps they mean that this duty prevents interference by means in themselves unlawful, and no more. This character of unlawfulness, however, is obtained from the fact that the acts or threatened acts which constitute the means of interference, are in violation of the defendant's duty, not to the plaintiff, but to a third person, usually the intending customer, or possibly to the public. That is, the act is unlawful because it is a tort to a third person or because it is a crime. Perhaps it would be the same if the defendant's act were a breach of contract with a third person.

The thought at once presents itself, — why should the plaintiff's right of action depend on whether the interference with him is a wrong to somebody else. It is perfectly possible to say that the defendant's duty to the plaintiff is to abstain from injuring the plaintiff's trade by doing violence to his customers, or by committing any manner of tort to his customers, or by committing a breach of contract with his customers, but that no duty exists to abstain from injuring the plaintiff's trade by acts which are just as harmful to the plaintiff, but are not a breach of any duty or obligation to the customer. Although to define the plaintiff's right and the defendant's correlative duty in this way is possible, it is not reasonable.

The important thing to the plaintiff in these cases is that there has been an interference with his trade or occupation which has caused damage to him. To persuade customers not to buy of him, or employers not to hire him, is as much of an injury in fact as to cause the same results by an assault. If the plaintiff's right to his trade or his calling is a thing which is protected against some invasion, it would seem that it should be protected against any equally injurious invasion, unless the defendant can show some justification for his conduct. A distinction between an invasion by violence to a third person and one by persuasion should not be made in the absence of authorities requiring it. If interference by

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<sup>1</sup> Chalmers-Hunt, *Trades Unions*.

<sup>2</sup> Peake N. P. 270.

acts intrinsically unlawful or violent is a tort to the trader or laborer, it must be because he has some kind of a right to freedom from interference, and the cases already referred to necessarily assume the existence of some such right. They are of no great assistance in determining its extent, but are quite as consistent with the theory of the existence of a right to trade freely with all persons willing to trade with the plaintiff, as with the existence of a right to freedom from interference by violent torts to others. On the other hand there are numerous intimations in the cases of the broader right.

In *Keeble v. Hickeringill*,<sup>1</sup> Lord Holt said, — “Where a violent or malicious act is done to a man’s occupation, profession, or way of getting a livelihood, then an action lies in all cases.” This has been characterized as a *dictum*, but it would seem to be something more than this. It is the reason given for holding the defendant liable for preventing wild fowl from entering the plaintiff’s decoy, by firing guns on the defendant’s adjoining land, with the intention of injuring the plaintiff. It is true that this decision may be supported on other grounds; but these are not the grounds on which Lord Holt based his decision. Of course, where there is more than one possible reason for a decision, there is always danger that the right decision may be reached instinctively, and the wrong reason given. Therefore, the reasoning of the court in such a case does not carry the same weight as where but one line of reasoning will support the decision. Yet it seems inaccurate to term the statement of the reason in such case merely a *dictum*. If, however, this language was merely a *dictum*, it was one of Lord Holt’s, and so worthy of careful consideration.

Two kinds of interference are mentioned, — one violent and the other malicious. The authorities cited are cases of violence, — that is, of intrinsically unlawful acts. It would seem, however, that the act in the particular case was not a violent act in this sense. Certainly it was not a violent act to any person but the plaintiff. It was not a tort to the plaintiff except as it injured him in the operation of his decoy. It was not an act intrinsically unlawful, for this, as used in the present connection, means unlawful independently of its effect upon the operation of the trader’s business. It was not an act of violence to the plaintiff. If the act was not violent toward the plaintiff, or toward a third person, and Lord Holt

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<sup>1</sup> 11 East, 574 n.

was correct in treating the case as one of interference with trade, the case is one of such interference by a malicious act. If so, and the case is to be followed, to interfere with a man's trade by a malicious act is actionable.

The legal meaning of this term "malicious" is not free from doubt. It is frequently used in law as meaning a malevolent act, and often as meaning merely an unjustifiable act independently of any malevolence. It is not certain in which sense it was used in this case. The facts do not necessarily indicate malevolence on the part of the defendant. They do show the absence of such justification for interference as may inhere in a purpose to further a defendant's own trade interests. Unjustifiable rather than malevolent is the meaning which has been attributed to the word more commonly in the later decisions.

Whichever the meaning, the act is one which is not unlawful except as it interferes with the plaintiff's rights, and the decision seems fairly to indicate that a trader has a right to freedom from interference by some acts not intrinsically unlawful, namely, acts for which the defendant cannot show a justification.

In *Rogers v. Rajendro Dutt*,<sup>1</sup> the Supreme Court of Calcutta held that the plaintiff had the right to exercise a lawful calling or trade, that of towing vessels, without undue hindrance from others, and that an order by the defendant, a government officer, that the pilots under the government control, who were the only pilots at the port, should not go upon vessels towed by the plaintiff, was an undue hindrance, and thus actionable. The Privy Council reversed this decision, on the ground that the defendant had acted without malice, and in representing the government, had forbidden its servants to serve with the plaintiff, because he, in the defendant's belief, had attempted to charge the government extortionately for towing government vessels. Even in the Privy Council there is no denial of the trade right of the plaintiff which had been asserted by the lower court, but merely a determination that the defendant's act did not infringe any such right. This may have been because there was a justification for it, namely, the defendant's own right to have the government servants subject to him, work only for those whom he wished; or that the defendant was so far identified with the pilots that there was no interference.

In *Allen v. Flood*,<sup>2</sup> the House of Lords decided that the plaintiff

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<sup>1</sup> 13 Moore's Privy Council, 209.

<sup>2</sup> [1898] A. C. 1.

had no cause of action where the defendant had persuaded the plaintiff's employer to discharge the plaintiff by asserting that the members of the union with which the defendant was connected would strike or would be called out unless the plaintiff was discharged. The defendant's reason for doing this was that the plaintiff, although a shipwright, had previously worked on metal work which the union desired to have done by metal workers only. There was no evidence of malevolence toward the particular plaintiff. The jury found that the defendant's act was a malicious one. The reasons given in the different opinions are so conflicting that we cannot regard the decision as an authority for anything beyond the very narrow point decided. It was probably the view of the majority that the defendant's act, even apart from any justification, did not infringe any right of the plaintiff. Lord Shand's opinion followed a distinctly different line, holding that the plaintiff was entitled to pursue his trade without hindrance, but that this right was subject to the same right in others, and that the defendant was pursuing this right. The majority of judges consulted in the case favored a decision for the plaintiff, and their opinions were based upon the ground that a man has a right to pursue his calling without interference by others, unless it be justified, and that there was no justification for it in the particular case.

In *Quinn v. Leathem*<sup>1</sup> it was held that the defendant was liable to the plaintiff where the defendant, as the treasurer of a union, had threatened to induce, and did induce, customers and servants to leave the plaintiff, the inducement of the customers being by a threat that their employees would strike. The reason for the defendant's conduct was the plaintiff's refusal to discharge certain non-union men. The reasons given in the opinion for distinguishing the case from *Allen v. Flood*, indicate that the latter decision was slightly discomfiting to some members of the House of Lords. Numerous reasons may be suggested for distinguishing the two cases, but *Quinn v. Leathem* certainly recognizes a right on the part of the plaintiff to freedom from interference in his trade. The interference was not conducted by means which were unlawful *per se*, unless the fact that there was combination constituted unlawfulness, although all the acts done and contemplated would have been free from this quality but for combination. There are

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<sup>1</sup> [1901] A. C. 495.

some statements in the opinions giving comfort to those who contend that combined action or combination for action is to be treated differently from individual action, but the opinions as a whole do not base the decision upon this.

Some of those who do not concede that a man has a right to freedom from interference in his trade by means in themselves lawful, attempt to distinguish some of the cases which otherwise would conflict with their view, by saying that they are cases of combination.

While there are many remarks to the effect that combined action is to be treated differently from individual action, it is difficult to find any case where the point is necessarily involved in the decision.<sup>1</sup> Where the purpose of the defendant's act is of importance, the fact of combination may be of considerable evidential value, to show his purpose. Also, if the case is one where the defendant may proceed by persuasion but not by compulsion, the fact that there is combination may be important, as acts which are persuasion merely by one, may become compulsion when done in combination.<sup>2</sup> There may be instances where interference by one person is of so little consequence that the law will not notice it, whereas, when multiplied by combination, it becomes sufficiently serious to warrant action. But apart from such distinctions as these, it is difficult to see why the plaintiff should have any more right to redress where his trade is interfered with by a combination than by an individual.<sup>3</sup>

The language of some cases suggests that the right to freedom from interference in trade or labor may be so broad that it is trespassed upon by mere persuasion addressed to intending customers, or intending employers, which results in damage to the plaintiff.<sup>4</sup> If the right is as broad as this, it is, of course, immaterial whether there is any malevolence or not in the defendant's conduct, until we come to the question of possible justification. The better view, and one which is taken in some jurisdictions, is, stated broadly, that a trader or laborer has a right to freedom

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<sup>1</sup> But see *Chalmers-Hunt, Trades Unions*; Lord Halsbury and Lord Bramwell in *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25.

<sup>2</sup> *Bowen, L. J., in Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598; Lord Lindley in *Quinn v. Leathem*, [1901] A. C. 495.

<sup>3</sup> *Delz v. Winfree*, 80 Tex. 400.

<sup>4</sup> *Walker v. Cronin*, 107 Mass. 555; *Moran v. Dunphy*, 177 Mass. 485; *Delz v. Winfree*, 80 Tex. 400; *Law Quarterly Review*, Jan., 1902.

from any damaging interference in his trade or calling, unless it be justified.<sup>1</sup>

If this view is adopted, one who interferes with another's freedom to trade or to labor commits a tort, unless he can show a justification for the interference. This possible tort-feasor himself has a right to the free exercise of his own trade or calling within certain limits. If, therefore, in his interference he exercises this right, the interference is justified, and he is not a tort-feasor.

There is some uncertainty whether he must establish not only that his acts are reasonably adapted to the furtherance of his own interests, but also that in fact he acted for this purpose; in other words, whether malice in fact, *i. e.*, malevolence, will deprive him of what would otherwise be a justification. It may be doubted whether it will. One is perplexed in this inquiry by the varying use of the word "malice." In most of the cases, the word is used to signify absence of justification merely, and not necessarily malevolence. In *Allen v. Flood*, most of the opinions use it in the former sense. Lord Shand, who deals with the case as one of justification, says distinctly that ill-will would not affect the result. Since in *Quinn v. Leatham* the facts do not show ill-will, malice is probably there used to signify absence of a justifiable occasion; and yet Lord Brampton draws an analogy from the malice which prevents a justification in malicious prosecution. In *Mogul Steamship Company v. McGregor*<sup>2</sup> the opinions in both courts consider not ill-will, but the presence of a justifiable object. On the other hand, in *Vegelahn v. Guntner*<sup>3</sup> and *Moran v. Dunphy*<sup>4</sup> malice may mean malevolence.

One of the analogies suggested as making malevolence of importance is malicious prosecution, — where the absence of malevolence is necessary to a complete justification, or rather its presence, to a complete cause of action. The mere fact that this would furnish an analogy is hardly enough to compel the application of the same rule to the present class of cases. There are analogies for the opposite view. One having an easement of passage, which is but the privilege to interfere with the exclusive occupancy of the owner of the servient tenement, would not be a trespasser merely because he walked solely for the purpose of annoying this

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<sup>1</sup> But see *Allen v. Flood*, [1898] A. C. 1; *Orr v. Home Mutual Ins. Co.*, 12 La. An. 255.

<sup>2</sup> [1892] A. C. 25; 23 Q. B. D. 598.

<sup>3</sup> 167 Mass. 92.

<sup>4</sup> 177 Mass. 485.



owner, *i. e.*, from malevolence. Further to apply the analogy of malicious prosecution strictly, would be to hold that interference is not actionable even in the entire absence of a justifying object, unless it appears by presumption in fact, or by evidence that the defendant acts from malevolence. This is negatived by numerous cases already mentioned.

If the accident of an analogy were the proof of a proposition, such could be found in the law of libel where the defense of a privileged communication cannot be maintained, if the defendant wrote for a malevolent purpose.

The real question is, or will be, which is the wiser rule in its practical application. If the law were administered by an omniscient tribunal, it would seem wise to say that interference by a person by means adapted to furthering his own interests is not justified where it is prompted by a purpose not to further these interests, but to do harm to another. Intentional damage has been inflicted, a thing which should not be permitted unless some good may be accomplished or is intended. On the other hand this rule would add to the law one more uncertainty. It would be an uncertainty arising in many cases, while the actual fact would exist in very few. The cases must be rare where a man has legitimate ends to serve, and yet seeks not to serve them but only to injure his competitor, — so rare as not to warrant in every case an inquiry into the condition of the defendant's mind. As a practical matter, there is no more reason for defeating a privilege by showing ill-will, than for making actionable all damage done in a spirit of ill-will. Certainly the law does not do this.

The class of cases where ill-will may be expected to play some part is where there is no interest of the defendant which can be served, and yet his interference is justified, such as cases of advice to friends for their benefit. It is improbable that a defendant would be held liable for advising a friend not to buy of the plaintiff or not to hire the plaintiff, if the defendant acted without ill-will and in the belief that the advice was required for the friend's protection;<sup>1</sup> but the defendant may be liable where he gives the same advice through a desire to injure the plaintiff. There is more reason for introducing the uncertainty of an investigation of mental condition, here, than where the alleged justification is benefit to the defendant's interests. A defendant will cloak malevolence with an ap-

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<sup>1</sup> *Walker v. Cronin*, 107 Mass. 555.

parent desire to help friends, much more frequently than he will disregard his own interests and act purely from malevolence, when he has interests which would be served by the same interference. Of course, those who deny the existence of the larger right to freedom from interference regard the case of advice to friends as somewhat in proof of their position, and say that the addition of malevolence does not make a cause of action; but it is submitted that such advice can better be dealt with as interference justified by a privilege not very unlike that found in some cases of slander.

If malevolence is not to be considered, the question of justification resolves itself into two elements, namely, — (1) the object which the interference is naturally adapted to accomplish; (2) the means employed in the interference. In some of the cases, the two are dealt with at once, making it difficult and sometimes impossible to determine whether it is the object or the means which the court regards as unjustifiable; but many of the cases leave no doubt on this subject.

Certain objects will justify interference, by justifiable means, with another's freedom to trade or labor.

Increasing one's custom by obtaining the customers of others, buying as low as possible, or selling as high as possible, whether the thing bought or sold is a commodity or is labor; giving as small a quantity as possible for the price, either of materials or labor; selecting associates or employers in labor or trade; or bettering the conditions and surroundings under which one labors, — are all objects which give a person the privilege to inflict on another damage in fact in the other's trade or labor, although this damage intentionally done might be actionable in the absence of such an object. While these are not the only objects which bestow a privilege, they are typical of the more obvious class.

A more troublesome question is presented when these objects are remote, and the immediate object is in itself but a means. The ultimate object of trades unions is doubtless to better the situation of their members, in such matters as the hours of labor, their wages, and the conditions under which they labor. The ultimate object of the combinations of traders and employers is, likewise, to better the situation of the combiners in such matters as the prices paid for labor, the cost of materials, and the prices of products. Where defendants act in such unions or combinations, is their ultimate object or their immediate object the test of their privilege?

Here, as on almost all questions connected with this subject, there is a difference of opinion.

In *Allen v. Flood*, the immediate object was to punish the plaintiff for working contrary to the rules of the union with which the defendant was connected. The ultimate object was to secure for this union all the work of a particular kind. Lord Shand looked at the ultimate object, and considered it a justification. Some of the judges consulted, looked at the immediate object, and considered it not a justification.

In *Quinn v. Leathem*, the immediate object was to obtain the discharge of men whom the plaintiff wished to employ, the more remote object was to punish these men for non-payment of dues, and doubtless the final object was to strengthen the defendant's union. The case may be disposed of regardless of the object, by the means employed, but no doubt was expressed but that the object was not a justification. *Temperton v. Russell*<sup>1</sup> is a similar case.

In *Lucke v. Clothing Assembly*,<sup>2</sup> *Curran v. Galen*,<sup>3</sup> and *Plant v. Wood*,<sup>4</sup> the object was, in the first, to keep the work in the hands of the union, in the last two, to have the plaintiffs join the union. This object was held not a justification, but with a dissent in the last by Justice Holmes.

In *Longshore Printing Company v. Howell*,<sup>5</sup> the object was to secure the discharge of apprentices employed in excess of the number prescribed by the rules of the union, and was held a justification.

In *Thomas v. Cincinnati*,<sup>6</sup> *Old Dominion Steamship Company v. McKenna*,<sup>7</sup> and *Toledo v. Pennsylvania*,<sup>8</sup> the object was an increase in the wages of third persons, — in the last case, persons of whom the defendant was the appointed representative, *i. e.*, the head of their union. It would seem that both the object and the means were held unjustifiable.

In *Bohn v. Hollis*,<sup>9</sup> *Jackson v. Stanfield*,<sup>10</sup> and *Carew v. Rutherford*,<sup>11</sup> the immediate object was to compel the payment of a penalty imposed by the combination or union, which the plaintiffs

<sup>1</sup> [1893] 1 Q. B. 715.

<sup>2</sup> 22 N. Y. Supp. 826.

<sup>3</sup> 26 Oreg. 527.

<sup>4</sup> 30 Fed. Rep. 48.

<sup>5</sup> 54 Minn. 223.

<sup>6</sup> 106 Mass. 1.

<sup>7</sup> 77 Md. 396.

<sup>8</sup> 176 Mass. 492.

<sup>9</sup> 62 Fed. Rep. 802.

<sup>10</sup> 54 Fed. Rep. 730.

<sup>11</sup> 137 Ind. 992.

were under no legal obligation to pay. This should be no justification. It was so held in the last two cases. In the first it was held that the defendant was not acting tortiously. Perhaps the court meant not that there was a justification, but that there was no interference.

In *Clemmitt v. Watson*,<sup>1</sup> it would seem that the court thought that the right to select one's companions in labor was a justification for combined refusal to work with the plaintiff.

In *Scottish Co-operative Company v. Glasgow Fleshers' Trade Association*<sup>2</sup> and in *Macauley v. Tierney*,<sup>3</sup> the object was to deprive a competing seller of his supply. This would seem to be a justification, and was so held in the latter case. In the former the defendant in fact prevailed, but the court does not make the grounds of its decision perfectly clear.

In *Mogul Steamship Company v. McGregor*, the immediate object was to obtain the plaintiff's custom, which was a justification.

In *Cote v. Murphy*,<sup>4</sup> the immediate object was to punish the plaintiff for yielding to the demands of strikers. The ultimate object was to secure their employees at lower wages. This was held a justification.

It seems to be the opinion of the court in *United States v. Weber*,<sup>5</sup> that it is unlawful to combine to monopolize labor for the purpose of enhancing the price of it unreasonably. If this view were taken, either all combinations to enhance wages should be held unlawful, as raising the price of labor beyond that fixed by the natural demand, or else the reasonableness of the price contemplated by the particular combination should be determined by the court in each case. The first alternative conflicts with the view generally expressed. The second is almost impossible of practical application. The fact that a monopoly is intended is but an incident which may be expected to add to the success of the plan, and it may make the agreements *inter se* unenforcible, but should not, apart from statutes, render the combination unlawful, if it would otherwise be lawful.<sup>6</sup> It would seem that apart from statutes a man should be permitted to obtain for his labor or wares as high a price as possible, even if this exceeds their reasonable value

<sup>1</sup> 14 Ind. App. 38.

<sup>2</sup> 35 Sc. L. R. 645.

<sup>3</sup> 19 R. I. 255.

<sup>4</sup> 159 Pa. St. 420.

<sup>5</sup> 114 Fed. Rep. 950; see *U. S. v. Haggerty*, 116 Fed. Rep. 510.

<sup>6</sup> *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; but see *Cote v. Murphy*, 159 Pa. St. 420.

under the normal conditions of supply and demand. If he can do it alone, he should be permitted to do it in combination.

Instances of justifiable objects may be multiplied almost indefinitely, and still leave the subject in much doubt. The better view would seem to be that it is the immediate object at which the court should look, in deciding whether the interference is justified. Damaging interference should be permitted only where it may contribute directly to the result which the defendants are entitled to attain. It should not be enough that some possible benefit may come to them at some uncertain future time. They should be permitted to interfere for the purpose of procuring the plaintiffs' discharge in order to obtain their places, of procuring others to refuse to work for the defendants' employer at lower wages than the defendants are willing to accept, or of procuring others not to buy of the plaintiffs if these others will thereupon naturally buy of the defendants. They should not be permitted to interfere for the purpose of extorting money which there is no obligation to pay, of inducing men to join their union, or of punishing them for disobedience of its rules. It is competition which furnishes the justification, but competition in its more limited sense. Interference with the plaintiff cannot be permitted for the purpose of inducing or compelling him to do something, merely because the defendants honestly believe that mankind or a large part of mankind will thereby be bettered.

If a person's object is one which may justify some interference with another's freedom in trade or labor, yet the interference must be by means which are justifiable. It is apparent that interference by physical violence is not permissible. Perhaps it is safe to say the same of any act which is intrinsically a tort. The more troublesome question is where the acts of interference are in themselves lawful, and become wrong, if at all, only because they are a means of interference with the freedom of the plaintiff trader, or laborer.

It seems that combination for a lawful object is not of itself an unlawful means. It may, however, in some cases turn mere persuasion into practical compulsion, intimidation, or molestation. Except in these cases, it is the acts done in combination which give it its character. However, there may be unjustifiable acts done in forming the combination. It is frequently said that any one person may refuse to work except on terms agreeable to him, and that any number of persons may combine to do the same.

This is true in a measure; but yet the first act of interference may come in the formation of the combination. Where one man refuses to work for the plaintiff, he does not interfere with the plaintiff's freedom of trade, because interference presupposes that there is some one who might trade with the plaintiff if the defendant did not persuade or prevent him from doing so. The defendant does not interfere with the plaintiff's trade. He merely does not trade with him. So there is no interference where a number of men coincidentally refuse to work for the plaintiff.<sup>1</sup> Hence no justification is required. As soon, however, as one-half of the combination persuades the other not to work, there is an interference, not by the whole but by the first half. Then a justification must be found.<sup>2</sup>

A union leader who orders a strike is usually by prior choice the agent of the employees, and acts on their behalf. If so, his act in ordering a cessation of labor is not an interference, if their act in ceasing would not be; but if he acts not as their agent, but influences them to cease, he interferes, and a justification must be found. What is true of the combined ceasing to labor, is true of the combined ceasing to employ, buy, or sell. Hence, the mere refusal of the defendants in combination to deal with the plaintiff is usually something which requires no justification; but if one induces another to refuse, there is interference which does require a justification.

*Carew v. Rutherford*<sup>3</sup> is very near the dividing line. The defendants left the plaintiff's employ in combination. It may be doubted whether so much would constitute an interference; but other employees, not members of the defendants' association, also left. The court treats the act of the defendants as combining to induce others not to labor for the plaintiff, and intimates that men may combine not to labor. It is not left entirely clear, however, whether the court would or would not have regarded the defendants' conduct as tortious if it had been limited to acting upon the members of their own association in pursuit of one of the objects for which it was formed.

The most innocent means of interference is persuasion. This may be of at least two kinds, namely, that which directly affects the commodity or labor in dispute, and that which does not.

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<sup>1</sup> *Delz v. Winfree*, 80 Tex. 400.

<sup>2</sup> Consider *Carew v. Rutherford*, 106 Mass. 1.

<sup>3</sup> 106 Mass. 1.



Where employees singly or in combination withhold their labor from the plaintiff in an effort to get higher wages, they should be permitted by peaceable means to persuade other laborers not to take their places; and probably it would be so held generally. Such persuasion, if successful, directly affects the value of the defendant's labor, as it lessens the supply. The same is true conversely where the defendants are employers seeking to reduce wages. So defendants seeking to lower the price of materials or to raise the price of products, should be permitted to persuade other buyers in the one case, or sellers in the other, not to buy of the plaintiff or not to sell to him. All such persuasion directly affects the immediate supply or demand for the defendants' labor or wares.

Where employees withhold their labor from the plaintiff, and for the purpose of inducing him to accede to their demands, persuade his customers not to buy of him until he surrenders, they do something which is foreign to the labor which is in dispute. Such persuasion should not be permitted. It either accomplishes nothing, or else becomes momentous enough to be a subtle kind of coercion. This view may not be favored, however, and is in conflict with the language of some opinions.<sup>1</sup> The rule should be the same in the converse case, *i. e.*, where the employer persuades provision dealers not to sell to the employee until he submits to lower wages.

The distinctions between the kinds of persuasion described in the preceding two paragraphs, is crudely expressed as the difference between a peaceable strike and a peaceable boycott; but both of these words are too uncertain of meaning to be either helpful or safe.<sup>2</sup>

Although the laborer may be permitted to persuade others not to deal with his employers, he cannot influence them by physical intimidation, molestation, or coercion, or by threats of these. Threats are sometimes called a prohibited means, but it seems obvious that the threat must get its character from the act threatened. If such act is a permissible means of interference, then so is the threat of it; and the converse is true.

When the intimidation, molestation, or coercion is not physical, the case is not so clear. The tendency seems to be, and rightly

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<sup>1</sup> *Plant v. Wood*, 176 Mass. 492; *Vegelahn v. Guntner*, 167 Mass. 92.

<sup>2</sup> *Arthur v. Oakes*, 63 Fed. Rep. 310.

so, to treat interference by such means as unjustifiable. What constitutes moral coercion, intimidation, or molestation is another troublesome question. When, as in *Quinn v. Leathem*, a customer is threatened in substance with the entire cessation of his business if he buys of the plaintiff, he still is free to buy of the plaintiff if he wishes. His choice is not, however, free in the same sense that it is when he decides between the wares of the plaintiff and those of another dealer, on account of their relative value to him.

In *Vegelahn v. Guntner*,<sup>1</sup> the opinion of the majority seems to discountenance conduct which makes employment unpleasant or intolerable, or amounts to moral intimidation, such as exists in picketing or patrolling; and in *Plant v. Wood*,<sup>2</sup> the same is true of acts which take away the free will of the customer. Mr. Justice Holmes dissents in both cases. Of course in the latter case the object as well as the means is held to be wrong.

In *Temperton v. Russell*,<sup>3</sup> there are intimations that the combined persuasion of third persons not to buy is a wrongful means. Here also the object is wrong. But in *Scottish Cooperative-Company v. Glasgow Fleshers' Trade Association*,<sup>4</sup> where the object was a proper one, it was held permissible to induce a third person not to sell to the plaintiff by a threat that the defendants in combination would otherwise refuse to buy.

If the defendants threaten to cease purchasing from a seller unless he refuses to sell to the plaintiffs, it would seem that the defendants do not coerce the seller.<sup>5</sup> They give him a choice between two things of the same kind, which are the very subjects of the competition, namely, — the plaintiffs' trade and the defendants' trade. If the latter is much more valuable than the former, the seller's selection will be affected thereby; but thus by the intrinsic worth only of the thing chosen, and not by a fear of unrelated consequences. The case is similar where the plaintiffs and defendants are competing sellers, employers, or laborers. The defendants' threat to cease selling, employing, or laboring, leaves the third person a choice which is affected by nothing but the comparative value of competing things of a like kind.

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<sup>1</sup> 167 Mass. 92; consider *Taff Vail R. R. Co. v. Amalgamated Society of Ry. Servants*, in King's Bench Div. of High Court of Justice, Dec., 1902.

<sup>2</sup> 176 Mass. 492.

<sup>3</sup> [1893] 1 Q. B. 715.

<sup>4</sup> 35 Sc. L. R. 645.

<sup>5</sup> *Macauley v. Tierney*, 19 R. I. 255.

Where the object is proper, there is a difference of opinion as to whether a refusal in combination to labor for a third person, or to buy of him for the purpose of inducing him not to trade with the plaintiff, is a permissible means. As a practical matter this usually destroys the freedom of the third person to choose. If interrogated, the most common form of answer would be that he was "afraid" to buy or to employ. The defendant should not be permitted to produce such a condition in fact.

In *Allen v. Flood*, there was a difference of opinion as to whether this amounted to coercion. If there is such a thing, this would seem to be moral coercion. Of course this kind of fear is not created by every strike or boycott. Its magnitude is of importance. If the case is such that the courts will say that it is permissible to interfere by persuasion but not by coercion, it would seem proper to test the propriety of the means employed, by the effect which they will naturally produce upon the ordinary man. If the strike or boycott threatened will override his freedom of choice, it should not be permitted. Here the element of combination is important, not because it makes the act that of several, but because it makes the act more forceful. The threat of withdrawal of custom by the farriers of a country town should not be given a larger effect than a similar one uttered by the United States Steel Corporation, although the latter is a single entity.

While the combined withdrawal of labor or of custom from the plaintiff by the defendants does not ordinarily constitute an interference, it has been held that there may be features of such a combination which differentiate it from the ordinary, and thus present a case of interference by coercion. In *Boutelle v. Mair*,<sup>1</sup> the defendants in combination imposed fines on members dealing with non-members. As a result, no one would deal with the plaintiff, not a member. This was held unlawful, as the enforcement of the will of the majority of the association upon the minority by means of fines and penalties made the withdrawal of custom not voluntary, but induced by intimidation. The court considered that the concert of action having been obtained by coercion, was not made lawful by the fact that the members of the association had originally agreed to the passage of the coercive rules. In *Mantell v. White*, on very similar facts, the Superior

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<sup>1</sup> 71 Vt. 1.

Court of Massachusetts ordered a verdict for the defendants. Exceptions to this ruling were argued in the Supreme Judicial Court in December, 1902.

It is regarded lawful and proper to combine to keep trade within the membership of the combination. Obviously members so agreeing should keep their agreements. If they do, the plaintiff sustains his damage, but has sustained no injury. It would seem that the addition of provisions for fines, and expulsion for breach of agreement, is a reasonable means of compelling the members to do what they ought to do any way, namely, to do as they agreed. Then a fine levied pursuant to previous agreement is not a coercive measure. The freedom of choice thereby attacked was voluntarily surrendered in advance.

An element of moral coercion is introduced if the membership in the combination or acquiescence in the non-trading agreement was not voluntary originally. This may be not infrequently the case. Coercion in this form should not be permitted.

It should not be overlooked that furthering the defendants' interests will not justify them in inducing a breach of contract.

The conflicting rights of trade and labor are too many to be dealt with exhaustively in an article of permissible length; and the present one is intended as suggestive merely. The cases in the footnotes are not offered as supporting the text, but as bearing on it.

With numerous qualifications, this may be asserted as the better view, namely, — where a man, or combination of men, refuses to deal with a plaintiff, there is no interference with the latter's freedom in trade or labor. Where a man, or combination of men, intentionally induces a third person not to deal with the plaintiff, and thereby causes him damage, there is an interference with the latter's right to freedom in trade or labor, and a tort has been done him, unless the interference is justified. It is justified only if the defendants have interests which may reasonably be served thereby, or act for the interests of others whom it is proper that they should so serve, and the interference is by means which are permissible. Means are not permissible which deprive the third person of the exercise of free will.

*Edward F. McClennen.*

BOSTON, December 26, 1902.

THE NEGOTIABLE INSTRUMENTS LAW —  
NECESSARY AMENDMENTS.

THE Negotiable Instruments Law has been enacted in twenty states and the District of Columbia. There is reason to believe that it would have been adopted in some other states but for the criticisms of several of its provisions in earlier numbers of this REVIEW.<sup>1</sup> In the American Law Register for August, September, and October there is a series of articles by Mr. Charles L. McKeehan upon "The Negotiable Instruments Law — A Review of the Ames-Brewster Controversy."<sup>2</sup> Whether readers agree or disagree with the reviewer's conclusions, all must recognize his ability, impartiality, and knowledge of his subject. This year most of the biennial legislatures meet, and attempts will be made to secure the enactment of the new code in additional states. It is quite possible that attempts will also be made to amend the Law in some states which have adopted it.

It is not the object of this paper to reiterate in detail former criticisms upon the new code. But, inasmuch as the reviewer of the Ames-Brewster controversy sustains the greater part of these criticisms,<sup>3</sup> it seems worth while to point out that the most serious defects in the new code are in those sections in which the codifiers departed from the model of the English Act, and to call attention to two sections in which the defects, though common to both Acts,

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<sup>1</sup> 14 HARV. L. REV. 241, 442; 15 HARV. L. REV. 26. These criticisms and the replies thereto by Judge Brewster in 10 YALE L. J. 84; 15 HARV. L. REV. 26 together with a letter from Mr. Arthur Cohen, Q. C., to Judge Brewster, and the text of the Negotiable Instruments Law have been published in a pamphlet by the Harvard Law Review Publishing Association.

<sup>2</sup> 41 AM. L. REG. 3, 499, 561.

<sup>3</sup> It is right to say that Mr. McKeehan has convinced the writer that his first objection to § 49 is fully met by the suggestion that the indorsement required of the transferor might in certain cases be a qualified indorsement. If the American courts would follow the Scotch precedent of *Hood v. Stuart* (Court of Sess. March 20, 1870) in which case the assignee of the accommodated payee was allowed without the aid of the latter's indorsement to charge the accommodating acceptor, his second objection to that section would disappear also. He must dissent, however, from Mr. McKeehan's view that the case of accommodation and the case of fraud are to be treated in the same manner. The reason for the distinction is clearly pointed out in the Scotch case.

not only change well-established American law, but also threaten serious injustice.

The sections that would be wisely amended by making them uniform with the English Act are eight, namely, 20, 40, 65-4, 119-4, 120-3, 120-5, 120-6, and 137. The other two are sections 124 and 186.

SECTION 20 makes an agent, who signs his principal's name without authority, liable on the instrument. The decisions and text writers are almost unanimous against this doctrine,<sup>1</sup> which arbitrarily imposes upon the parties a contract which was not in the contemplation of anybody. It may work, too, very unjustly. It is right that the agent should be held to warrant his authority to act as agent, and made to answer to the other party for damages suffered by reason of his not getting the principal's obligation. But to make the ostensible agent liable for the face of the instrument, when the contemplated principal was insolvent, would give the holder unjust enrichment and impose an undeserved penalty upon such agent.<sup>2</sup> To amend this section, strike out in the fourth line the words "if he was duly authorized."

SECTION 40. Section 8-3 of the English Act, of which Sections 9-1 and 9-5 are a reproduction, was intended to supersede the doctrine of *Smith v. Clarke*,<sup>3</sup> by which an instrument indorsed in blank continued negotiable although subsequently indorsed specially.<sup>4</sup> But Section 40 revives *Smith v. Clarke* by enacting that "where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery." Mr. McKeehan endeavors to save this section by reading into it before the

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<sup>1</sup> *Hall v. Crandall*, 29 Cal. 567; *Lander v. Castro*, 43 Cal. 497; *Taylor v. Shelton*, 30 Conn. 122; *Duncan v. Niles*, 32 Ill. 532; *Seeberger v. McCormick*, 178 Ill. 404, 417; *Thilmany v. Iowa Co.*, 108 Iowa 357, 363; *Noyes v. Loring*, 55 Me. 408; *Bartlett v. Tucker*, 104 Mass. 336; *Sheffield v. Ladue*, 16 Minn. 388; *Cole v. O'Brien*, 32 Neb. 68; *Patterson v. Lippincott*, 47 N. J. Law 457, 459; *White v. Madison*, 26 N. Y. 117; *Miller v. Reynolds*, 92 Hun 400; *Delius v. Cawthorn*, 2 Dev. 90; *Bryson v. Lucas*, 84 N. C. 680, 683; *Trust Co. v. Floyd*, 47 Oh. St. 525; *Hopkins v. Mehaffy*, 11 S. & R. 126 (semble); *Story, Ag.* (9th ed.) § 764 a; *Mechem, Ag.* § 550; *Huffcut, Ag.* § 230; *Reinhard, Ag.* § 307.

In two or three states an agent who without authority signs 'A. B. agent for C. D.' is held liable on the instrument, everything after his own signature being ignored. *Byas v. Doores*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196. But no case has been found in which A. B. signing simply the name of 'C. D.' was charged on the instrument.

<sup>2</sup> *Re Nat. Co.*, 24 Ch. Div. 367, 372, 375.

<sup>3</sup> *Peake*, 225.

<sup>4</sup> *Chalmers, Bills of Exch. Act* (5th ed.) 24; *Mr. Cohen's letter*, 15 HARV. L. REV. 37.



word "payable" the word "originally."<sup>1</sup> But this is inadmissible. Instruments payable to bearer are defined with great care in Section 9 as including several species of instruments. Wherever the generic term is used without qualification in another section, it cannot be limited to one of the species.<sup>2</sup> Furthermore, Mr. Crawford, the draughtsman of the new code, in his note to Section 40 cites *Smith v. Clarke* as if still law. So do the other commentators upon the Act.<sup>3</sup> Mr. McKeehan's suggestion is also opposed to the interpretation given to this section by Judge Brewster, the Chairman of the Committee on Uniform Laws. Section 40 should be expunged.

SECTION 65-4 introduces the novel distinction that a transferor by delivery is a warrantor of title and genuineness only to his immediate transferee while the similar warranty of the indorser without recourse runs to all subsequent holders. There is no authority for this arbitrary distinction.<sup>4</sup> The only decision on the point is against this distinction.<sup>5</sup>

Another new and unfortunate distinction is introduced by subsection 4, by which the transferor of an instrument void for usury is not liable as a warrantor, unless he was aware of the usury, whereas the transferor of an instrument void for coverture or voidable for infancy is liable as a warrantor, although he was ignorant of the coverture or infancy. This distinction is due to the anomalous

<sup>1</sup> 41 Am. L. Reg. 461.

<sup>2</sup> Section 9-1 reads: "The instrument is payable to bearer when it is expressed to be so payable." Mr. McKeehan understands this section to mean only instruments originally payable to bearer. Such was formerly the opinion of the writer. 14 HARV. L. REV. 246. But clearly it must apply to an instrument originally payable to order and indorsed by the payee expressly "Pay to bearer." Whether, therefore, an instrument is payable to bearer under each of the paragraphs of Section 9 would seem to depend upon the form of the instrument, not at the time of its creation, but at the moment of inspection. An instrument originally payable to order may become payable to bearer by an indorsement to bearer or by an indorsement in blank, and conversely an instrument originally payable to bearer may cease to be so payable by a special indorsement.

<sup>3</sup> Norton, *Bills & Notes* (Tiffany's ed.) 116; Huffcut, *Neg. Inst.* 24; 17 Bank. L. J. 12 and 775; Selover, *N. I. L.* 189 n. 78, citing cases like *Smith v. Clarke*.

<sup>4</sup> The New York cases cited by Mr. McKeehan in 41 Am. L. Reg. 567, n. 12, in which an indorser without recourse was held to be incompetent to testify in an action by a remote holder against the maker, lend no support, it is submitted, to the notion that such an indorser was liable to the remote holder. He was incompetent even if not liable directly to the plaintiff, for if the plaintiff failed to charge the maker, he might proceed against his transferor, and the latter against his predecessor, and so ultimately the indorser without recourse might be sued by his immediate transferee.

<sup>5</sup> *Watson v. Chesire*, 18 Iowa 202.

decision in *Littauer v. Goldman*,<sup>1</sup> and the anomaly, already condemned in other jurisdictions,<sup>2</sup> should not be perpetuated in the Negotiable Instruments Law. In one class of cases the transferor's warranty is rightly limited by his knowledge of the facts at the time of transfer. If the instrument is not collectible by reason of the insolvency of prior parties, he warrants only his ignorance of such insolvency.<sup>3</sup> Section 65 should be amended so as to read as follows:

"Every person negotiating an instrument by delivery merely, or by indorsement, with or without qualification, warrants to his immediate transferee,

"1. That the instrument is genuine and in all respects what it purports to be.

"2. That he has a good title to it.

"3. That it is subject to no real defense, and, if the transfer is after maturity, that it is subject to no personal defense, in favor of any party to the instrument.

"4. That he has no knowledge of any fact which impairs its collectibility."<sup>4</sup>

Because of the amendment of Section 65, Section 66 should also be amended by cancelling everything after "qualification" in the first line to "engages" in the sixth line.

SECTION 119-3 provides that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money." The acceptance of a chattel in satisfaction of an unmatured simple contract claim discharges it. Therefore such a satisfaction of a note before maturity must, according to this provision, discharge the note. This is a startling innovation, and doubtless to no one more surprising than to the framers of the Act. Mr. McKeehan recognizes the justice of the criticism upon this section.<sup>5</sup> The provision should be cancelled. It would be useless even if it were not mischievous.

<sup>1</sup> 72 N. Y. 506.

<sup>2</sup> *Wood v. Sheldon*, 42 N. J. Law 421, 424; *Meyer v. Richardson*, 163 U. S. 385, 411, 412.

<sup>3</sup> Cases cited in Chalmers, *Bills of Exch. Act* (5th ed.) 195, n. 1. See also *Gordon v. Irvine*, 105 Ga. 144; *Brown v. Montgomery*, 20 N. Y. 287 (seller of post-dated check knew that another check of drawer had just been dishonored).

<sup>4</sup> The words "impairs its collectibility" seem to be preferable to "render it valueless," the words of the Negotiable Instruments Law. The warranty should attach, if the instrument is worth fifty cents on the dollar. But such an instrument is not valueless.

<sup>5</sup> 41 Am. L. Reg. 573.

SECTION 120-3. "A person secondarily liable on the instrument is discharged: — By the discharge of a prior party." If the word "discharge" is to receive its natural interpretation, standing as it does without any qualification, it must mean any kind of discharge whether by act of the parties or by operation of law. One secondarily liable would be discharged, therefore, if any prior party should be discharged by the Statute of Limitations, or if any prior indorser should be discharged by the holder's failure to give him due notice of dishonor, and, in jurisdictions where joint obligations are not made joint and several by statute, the death of a surety co-maker would discharge all subsequent parties. A provision producing such results is a legal monstrosity. The defenders of this sub-section say that it applies only to a discharge by act of the parties. But Mr. Crawford in his note to this provision states that an indorser is discharged if the claim against the maker is barred by the Statute of Limitations.<sup>1</sup> The same view is advanced by the commentator in the *Banking Law Journal*.<sup>2</sup> If a holder appoints an indorser his executor, the law, regardless of the intention of the parties, discharges all subsequent indorsers.<sup>3</sup> Is this a discharge by operation of law or by the act of the parties?

But even if the operation of the sub-section is limited to a discharge by the parties, it is mischievous. It would discharge the accommodated indorser if the holder, with knowledge of the accommodation, should release the accommodating maker. Judge Brewster concedes this. All possible mischief would be avoided and no loss suffered by cancelling this sub-section.

SECTIONS 120-5 and 120-6. No elasticity of interpretation can correct the errors of these sub-sections.<sup>4</sup> They declare in effect that a release or the giving of time to an accommodation acceptor or maker will discharge the accommodated drawer or indorser, and thereby overturn well-established doctrines of Surety-

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<sup>1</sup> *Crawf. Ann. N. I. L.* (2d ed.) 108. It appears from this note that this sub-section was inserted to bring about this very result.

<sup>2</sup> 19 *Bank. L. J.* 402.

<sup>3</sup> *Jenkins v. Mackenzie*, 6 *Up. Can. Q. B.* 544; 4 *Am. & Eng. Enc. of Law* (2d ed.) 506, n. 6.

<sup>4</sup> It has been suggested that "principal debtor" in Section 120-5 may not be synonymous with "party primarily liable." But as the "principal debtor" is contrasted with the "party secondarily liable" the words must be used in the sense of "party primarily liable." Obviously the release in Sub-Section 5 and the giving of time in Sub-Section 6, in which the words "principal debtor" do not occur, are intended to have the same operation. See Mr. McKeehan's observations in 41 *Am. L. Reg.*

ship. These inaccurate statements of the law of Suretyship should be eliminated.

SECTION 137, treating a destruction or a withholding of a bill by the drawee as an acceptance, is worse than the writer at first supposed. He criticised it as objectionable in point of form. Mr. Cohen, in his letter to Judge Brewster,<sup>1</sup> and Mr. McKeehan<sup>2</sup> have made it clear that the section is erroneous in principle. If the drawee of a three months bill presented to him for acceptance should, in a fit of anger at the drawer's presumption in drawing upon him, refuse to accept it and throw it in the fire, the holder, under this section, would have no remedy on the instrument against the drawer either on the bill or for the consideration for which the bill was given until after its dishonor by non-payment. As Mr. Cohen says: "This is not in my opinion the law, and ought not to be the law." This section should be expunged.<sup>3</sup>

Each of the amendments thus far recommended would remove a difference between the English and American codes. It remains to consider two sections whose amendments would introduce a difference between the two codes.

SECTION 124. By the English decisions a material alteration of an instrument, even by a stranger, nullified it. The American courts, deeming the English precedents repugnant to justice, declined to follow them, and decided that the holder should not forfeit his rights because of this wrongful act of a stranger. The Bills of Exchange Act codified the English decisions. The Negotiable Instruments Law, instead of codifying the American decisions, abandoned them, and restored the medieval doctrine of forfeiture. Other things being equal, uniformity between the American and English law is to be encouraged. But where it is a choice between uniformity and justice, American legislators ought not to hesitate to sacrifice uniformity. Upon the point of justice in this case the words of Mr. Justice Story may be cited: "The old cases proceeded upon a very narrow ground. It seems to have been held, that a material alteration of a deed by a stranger, without the privity of either obligor or obligee avoided the deed;

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<sup>1</sup> 15 HARV. L. REV. 38.

<sup>2</sup> 41 AM. L. REG. 583.

<sup>3</sup> This section is objectionable for another reason. A drawee, who destroys the instrument, is properly liable to the holder for its collectible value, as in any case of conversion of a bill. But the fictitious acceptor, under this section, must pay the payee the face value of the bill, although the drawer is hopelessly insolvent.

and by parity of reasoning the destruction or tearing off the seal either by a stranger or by accident. A doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority, before a Court of law is bound to surrender its judgment to what deserves no better name than a technical quibble."<sup>1</sup> The section should be amended by adding after the word "altered" in the first line the words "by the holder." It is believed that it would be advisable also to insert before the word "materially" in the first line the words "fraudulently and."

SECTION 186 together with Section 89 provides that the drawer of a check is absolutely discharged by the holder's failure to give him due notice of its dishonor although the laches has not caused any loss to him. This section changes well settled law, and for the worse. Fortunately cases presenting the facts here supposed are not likely to be frequent. But this will be small consolation to the particular plaintiff when the case does arise.

To sum up, Sections 20, 65-4, 119-4, 120-3, 120-5, 120-6, and 137 are obnoxious to these three objections. They introduce unnecessary distinctions between the English and American codes. They nullify generally established and well-approved doctrines of the American and English courts. They are sure to provoke needless litigation and to cause much injustice.

Section 40 is open to the first and third objections, and furthermore nullifies the wholesome innovation of Section 9-5.

Section 186 is opposed to the American and English precedents and is doubtless due to an inadvertence of the American and English codifiers.

Section 124 is a return to archaic formalism, and the language of Judge Story, already quoted, fittingly describes its injustice.

The writer retains his conviction that it is wiser to have no code at all than to adopt the Negotiable Instruments Law in its present form. If, on the other hand, this law should be amended as suggested in this paper, the sooner it is enacted throughout the Union, the better.

*J. B. Ames.*

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<sup>1</sup> U. S. v. Spalding, 2 Mas. 478, 482. See the similar remarks by Beasley, C. J., in Hunt v. Gray, 35 N. J. Law 227, 233.

## CONFLICT OF LAWS.—SUBSTANCE OR OBLIGATION OF CONTRACT DISTINGUISHED FROM REMEDY.

ONE of the most puzzling of the many difficult points that beset the student of the Conflict of Laws is that of determining whether a particular question forms part of the substance or obligation of a contract, to be governed by the *lex loci*, or whether it is one of remedy merely, to be controlled by the *lex fori*. Frequently the two draw so close together that it becomes an intricate problem to ascertain whether the *lex loci* or the *lex fori* should be applied.

The purpose of this article is to propose a test by the application of which such problems may be solved, though no attempt will be here made to discuss the principles which determine what is the proper *lex loci* in a given case.

The substance or obligation of a contract embraces all the rights and liabilities that result expressly or impliedly from the agreement and understanding of the parties—everything within the view and intention of the parties when they enter into their contract. It is always and necessarily an implied part of the undertaking of the parties to a contract that the substance or obligation of that contract shall not be increased nor diminished nor impaired in any degree without their mutual assent, for that would be to create a new contract between them to which they have not agreed.

Directly opposed to this are the mere matters of remedy, which do not arise until a remedy is sought to enforce the contract after breach, and which were not within the contemplation of the parties when they contracted.

The latter questions are always controlled by the *lex fori*, the former by the proper law governing the contract — *lex loci contractus*.

After a contract is made, any requirement that the promisor should do more than he had originally agreed to perform increases the obligation of the contract, while the obligation is diminished or impaired by any requirement that he should do less than he originally agreed to perform, or which deprives the promisee of the power to enforce performance in accordance with the original intention of the parties, expressed or implied.



From these elementary principles may be deduced the criterion by which to ascertain whether a particular inquiry relates to the substance of the contract or to the remedy merely.

Since, as has been shown, it is always an implied part of the parties' undertaking that the obligation of their contract shall neither be increased nor impaired without their mutual assent, and since the *lex fori* controls only if the point to which the *lex fori* relates is a matter of remedy, not of obligation, the criterion given below follows as a logical corollary.

#### CRITERION.

Suppose the legislature of the *locus contractus* to enact the law of the forum, making it applicable to the existing contract. If the result is that the obligation of the contract is either increased or impaired thereby, then the point to which the law of the forum relates is part of the obligation or substance of the contract, and is not merely a matter of remedy, and the *lex loci*, not the *lex fori*, should control. If, on the other hand, the result is that the obligation of the contract is not at all affected, being neither increased nor diminished, then the inquiry relates to a matter of remedy only, and the *lex fori* should govern.

#### APPLICATION OF CRITERION.

We shall omit from our consideration all those cases where the validity of the contract is called in question by either law, though it would be easy to show by the application of this criterion that if the contract is void either by the proper law of the contract or by the law of the forum, the question as to its validity can never be regarded as a matter of remedy, but is always matter of substance, since the retrospective enactment in the *locus contractus* of a law identical with the *lex fori* must always, in such a case, either increase or diminish the promisor's obligation. It is proposed here to discuss only those cases where the validity of the contract is unquestioned.

There are numerous instances in which the courts have experienced great difficulty in deciding questions of this sort, which might for the most part have been determined readily enough if this test had been employed.

In *Ruhe v. Buck*,<sup>1</sup> the Missouri court was divided upon the ques-

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<sup>1</sup> 124 Mo. 178, 25 L. R. A. 178.

tion whether a law of the forum related to the remedy or to the obligation of the contract in suit. The contract (to pay money) was made in Dakota by a married woman, and was payable there. The Dakota law permitted her to contract and to sue and be sued as if she were unmarried. She owned land in Missouri which the Dakota creditor sought to attach. By the law of Missouri (*lex fori*) a married woman (for the purposes of this case) was competent to be sued personally, but her property could not be attached. The question was whether the particular remedy of attachment related to the obligation of the contract (to be governed by Dakota law) or to the remedy merely (in which case the law of Missouri would control).

The majority of the court decided in favor of the Missouri law, but there was a strong dissenting opinion. The application of our formula would show the decision of the majority to be correct. For suppose the Dakota legislature, after the contract was made, had passed a law similar to that of Missouri, making it applicable to the contract, that is to say, had deprived the creditor of his right to attach the debtor's property, leaving his other remedies against her untouched, this would neither have impaired nor increased the obligation of her contract.

In *Baxter Nat. Bank v. Talbot*,<sup>2</sup> an action was brought in Massachusetts against the indorser of a note, indorsed in Vermont to the plaintiff, and payable there. At the time of the indorsement there had been an *oral* agreement between the indorser and the indorsee (the plaintiff) that the former should be liable upon the indorsement only to the extent of a certain fund in his hands. By the law of Massachusetts (*lex fori*) evidence could not be introduced of this contemporaneous oral agreement to alter the absolute liability imposed by the indorsement. By the law of Vermont (where the indorsement was made and the note payable) a contract of indorsement was not absolute, but dependent upon the understanding of the parties, which might be proved by parol. It was insisted that this was a matter of evidence and remedy, to be controlled by the law of the forum, but the court held it to be part of the indorser's obligation, to be governed by the law of Vermont.

According to the test above laid down, this case was rightly decided. For if the Vermont legislature, after this indorsement had been made, had passed a law identical with that of Massachusetts,

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<sup>1</sup> 154 Mass. 213, 28 N. E. Rep. 163.

depriving the indorser of the right to show that his liability was *limited only*, the obligation of his contract would thereby be increased, that is, he would be bound to pay the face value of the note instead of merely the amount of the fund in his hands.

Another example may be found in *Downer v. Chesebrough*.<sup>1</sup> In that case an action was brought in Connecticut against the indorser of a note, made and payable in New York, and there indorsed. It had been orally agreed between the indorser and indorsee that the indorsement was only for collection. By the New York law evidence of this agreement was not admissible. By the law of Connecticut (*lex fori*) it was. The court enforced the law of Connecticut. Applying our test, let us suppose the New York legislature to pass a law, subsequent to the contract of indorsement, similar to the Connecticut rule, permitting the indorser to show the understanding under which the indorsement was made, namely, that it was merely for collection. This would neither increase nor diminish the obligation of the indorser, but would simply show what that obligation was.

So in *Hoadley v. Transportation Company*.<sup>2</sup> In that case an engine had been consigned to the defendant at Chicago for transportation to Lawrence, Massachusetts, but was destroyed by fire in the depot at Chicago through no fault of the defendant. The defendant had given a receipt excepting liability for loss by fire while in depot or in transit. By the law of Illinois, where the receipt was given, the mere acceptance thereof did not import assent to its conditions, without affirmative evidence of such assent; by Massachusetts law it did. The trial court held this to be matter of substance, to be governed by the Illinois law, but the appellate court reversed the decision, and followed the law of Massachusetts.

This is substantially like the last case, and upon an application of the test it will be seen that if the Illinois legislature had retroactively applied the law of Massachusetts to the contract, it would neither have increased nor impaired the real obligation, but would merely have determined what that obligation was.

In the recent case of *Atwood v. Walker*,<sup>3</sup> action was brought in Massachusetts upon a contract made in New York to convey land situated in Massachusetts. It was held that the measure of damages for the breach of the contract was a part of the obligation of the

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<sup>1</sup> 36 Conn. 39, 4 Am. Rep. 29.

<sup>2</sup> 115 Mass. 304.

<sup>3</sup> 61 N. E. Rep. 58 (Mass.). See also *Dike v. R. R. Co.*, 45 N. Y. 113.

contract, to be determined by the law of New York, — not a mere matter of remedy, to be controlled by the *lex fori*. An application of our criterion would seem to work out the same result. For there can be little doubt that if the legislature of New York had passed a retroactive statute altering the measure of damages so as to require the promisor to pay less damages than he would have been obliged to pay under the original law, the obligation of the contract would have been thereby impaired; and if, under the new law, he should be obliged to pay more, his obligation would be increased.<sup>1</sup>

In *Succession of Cassidy*,<sup>2</sup> Henry Cassidy sold in Louisiana certain lands situated in Texas, with covenants of general warranty, to Horace Cassidy, who sold them in Texas with like covenants to the plaintiffs, who, having been evicted by title paramount, sued the estate of Henry Cassidy in Louisiana upon his general warranty. By the law of Louisiana (*lex fori*) suit could be brought upon such covenants only against the immediate grantor, bringing in remote vendors as parties. In Texas, the common law prevailed, by which an action for breach of covenant of title could be brought against any grantor in the chain of title. Upon the first hearing, the court decided that the question whether Henry Cassidy could be sued by a remote grantee was simply a matter of remedy. But upon a rehearing, it was held that it was part of the substance of the covenant. For if the Texas legislature had, after his conveyance, made him liable only to his immediate grantee, it would have diminished his obligation.

In *Garr v. Stokes*,<sup>3</sup> the defendant had made a contract in New York, by the law of which state he was not liable to civil arrest. Suit was brought in New Jersey, where he was proceeded against upon a *capias ad respondendum*. The defendant urged the law of New York, where the contract was made, as exempting him from civil arrest. But the court held that the New Jersey law (*lex fori*) should control, since it was a matter of remedy.

According to our formula, this case was correctly decided. For if the New York legislature, after the contract was made,

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<sup>1</sup> Whether the last proposition is strictly true may depend upon the vexed question whether a promisor has the right to break his promise upon the payment of damages, or whether he merely has the power to do so. It is at least doubtful.

<sup>2</sup> 40 La. Ann. 827, 5 So. Rep. 292.

<sup>3</sup> 16 N. J. Law 404, 405. See also *Wood v. Malin*, 10 N. J. Law 208; *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. Rep. 435, 438; *De la Vega v. Vianna*, 1 Barn. & Ad. 284, 20 E. C. L. 387.

had authorized an arrest to bring the defendant into court, such an enactment would neither have increased nor impaired the obligation of the contract.

So also in case of a *capias ad satisfaciendum*. Thus in *Woodbridge v. Wright*,<sup>1</sup> the question was whether upon a judgment for the plaintiff in Connecticut for goods sold and delivered in New York to the defendant, who was afterwards discharged from imprisonment in New York under its insolvent laws, the execution should issue against the body of the defendant or against his goods and estate only. The court held that the execution should go against body as well as estate, in accordance with the law of Connecticut.

In *Melan v. Fitz-James*,<sup>2</sup> a bond was executed in France and sued on in England. The bond was understood, according to the law of France, to bind the property only, and not the person of the obligor. The defendant was arrested, according to English law, upon a *capias ad respondendum*, and applied for his discharge upon the ground that the law of France, where his contract was made, gave no such personal remedy, but only a remedy *in rem*. Upon this state of facts the court held that the inquiry related to the obligation of the contract and that the French law should govern.

If, after the contract (binding the property only) was made, the law of France had been altered so as to give a personal remedy, such as arrest, against the obligor, it would have increased the obligation of the contract, for it would have transformed what was previously an obligation *in rem* only into an obligation *in personam* as well as *in rem*.

So, the ordinary statute of limitations (prescribing that after so many years no action shall be brought), when pleaded in defense of an action upon a contract, is justly held to be a matter of remedy only, to be governed by the *lex fori*, and that, too, whether the period prescribed by the *lex fori* be shorter or longer than that prescribed by the *lex loci*.<sup>3</sup> For (applying our test) a retrospective statute enacted in the *locus contractus*, either increasing or diminishing the period within which a suit may be

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<sup>1</sup> 3 Conn. 523.

<sup>2</sup> 1 Bos. & Pul. 138.

<sup>3</sup> Story, Conf. L. §§ 576 *et seq.* *Bank v. Donnally*, 8 Pet. 361; *Pritchard v. Norton*, 106 U. S. 124, 130; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 339; *Johnston v. R. R. Co.*, 50 Fed. Rep. 886; *Burgett v. Williford*, 56 Ark. 187, 19 S. W. Rep. 750; *Obear v. Bank*, 97 Ga. 587, 33 L. R. A. 384.

brought upon a contract, would neither increase nor impair the obligation of the contract, provided a reasonable period is permitted the promisee within which to enforce his claim.<sup>1</sup>

With respect to the point under discussion, cases involving the negotiability of notes have sometimes given rise to doubt as to the law which should properly govern.

Suppose a note, made and payable in New York, where it is negotiable, and suit brought thereon by the holder against the maker in Virginia, where no note is negotiable which is not payable at a banker's office in Virginia. The maker pleads a set-off against the payee. Is the set-off a good defense? In other words, should the Virginia court apply the law of New York or the law of Virginia?

The result reached by the application of our test is that it would be a matter of obligation, not of remedy, to be determined by the law of New York. For if, after the transfer of the note, the New York legislature should permit the maker thereof to plead equities arising between himself and the payee, it would impair the obligation of the maker to the holder. The actual decisions have reached the same conclusion.<sup>2</sup>

But if we suppose the case reversed, and the note to be non-negotiable in New York, but negotiable in Virginia (the forum), and suppose further that the New York legislature retrospectively takes away the right of the maker to plead set-off against the holder, such an enactment would neither increase nor impair the maker's obligation. It would merely require him to prosecute his claim against the payee in a separate action. According to our criterion therefore this would be a matter of remedy only, to be controlled by the law of Virginia (*lex fori*) and the set-off could not be pleaded. The weight of authority, it may be stated, is in favor of this view.<sup>3</sup>

Cases involving the statute of frauds have also sometimes caused the courts much trouble.

<sup>1</sup> *Koshkonong v. Burton*, 104 U. S. 668; *Wheeler v. Jackson*, 137 U. S. 245; *Ludwig v. Stewart*, 32 Mich. 27; *Hart v. Bostwick*, 14 Fla. 162.

<sup>2</sup> *Pritchard v. Norton*, 106 U. S. 124, 133; *Wilson v. Lazier*, 11 Gratt. (Va.) 477, 482; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. Rep. 775, 776; *Harrison v. Edwards*, 12 Vt. 648, 36 Am. Dec. 364.

<sup>3</sup> *Pritchard v. Norton*, 106 U. S. 124, 133; *Midland Co. v. Broat*, 50 Minn. 562, 52 N. W. Rep. 972, 973; *Bank v. Trimble*, 6 B. Mon. (Ky.) 599. But see *contra*, *Vermont Bank v. Porter*, 5 Day (Conn.) 316, 5 Am. Dec. 157. See also *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312, 317.



If, for instance, an oral contract is made and is to be performed in Virginia, whose law provides that *no action shall be brought* upon such a contract unless it be in writing, and suit is brought thereon in Maryland, whose law does not require it to be in writing, a question at once arises whether the action will lie in Maryland. The answer depends upon whether the inquiry is a matter of obligation or of remedy.

Applying our test, since a retroactive law passed in Virginia, permitting an action to be brought on the oral contract could neither impair nor increase the obligation of the promisor, the question is one of remedy, not of obligation, and the law of Maryland (*lex fori*) would control. This conclusion agrees with the weight of authority.<sup>1</sup>

If the above case be reversed, and we suppose the oral contract to be made and to be performed in Maryland, while the suit is brought in Virginia, an application of our test shows that the inquiry should then be regarded as pertaining to the obligation of the contract, not to the remedy. For if the legislature of Maryland should retroactively provide that no action should be brought upon the oral contract, it would undoubtedly *impair* the obligation of the contract. Many of the decisions favor this view,<sup>2</sup> but about as many hold the opposite, namely, that it is a matter of remedy.<sup>3</sup>

The English case of *Leroux v. Brown*<sup>4</sup> is the leading case taking the latter view. The facts were that an action was brought in England upon an oral contract made in France, which was not to be performed within one year. The English statute of frauds provided that no action should be brought upon such a contract unless it were in writing. The law of France contained no such provision. The court held that the action would not lie in England, on the ground that it was a matter of remedy, to be governed by English law. It should be observed, however, as to this decision,

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<sup>1</sup> See *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Wolf v. Burke*, 18 Col. 264, 32 Pac. Rep. 427. The last case is one wherein the contract in suit was *void* under the statute of frauds of the forum, and therefore does not come within the scope of our discussion, but the opinion is instructive. But see *contra*, *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. Rep. 795.

<sup>2</sup> *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 28 N. E. Rep. 163; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. Rep. 1111, 1112; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. Rep. 795.

<sup>3</sup> *Leroux v. Brown*, 14 Eng. L. & Eq. 247, 74 E. C. L. 800; *Wolf v. Burke*, 18 Col. 264, 32 Pac. Rep. 427; *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Hall v. Cordell*, 142 U. S. 116.

<sup>4</sup> 14 Eng. L. & Eq. 247, 74 E. C. L. 800.

that the attention of the court was in large measure directed to the question whether the statute of frauds *invalidated* the oral contract or merely suspended the remedy. The decision goes in the main upon the theory that nothing is part of the substance of a contract unless it relates to the *validity* thereof.

There is still another class of cases that has given the courts great difficulty, namely, those (usually garnishment cases) involving exemptions of wages, etc.

A citizen of Virginia, employed (we will suppose) by a railroad company, there contracts a debt. Wages are due to the debtor from the railroad company. The creditor attaches the wages due the debtor and garnishes the company in North Carolina. The debtor claims his wages as exempt under the law of Virginia. The North Carolina law exempts wages of those laborers only who are citizens of North Carolina (as is usually the case with such exemption laws) or permits a *less* exemption than the *lex loci* or *no* exemption at all. Which law is to be applied?

Granting that the North Carolina court has proper jurisdiction of the *res* in the attachment suit (*i. e.*, of the debt), and employing our criterion once more, it is apparent that should the Virginia legislature abolish or diminish the debtor's exemption in this case, the obligation of his contract would neither be increased nor impaired. It would be merely a matter of remedy, therefore, and the law of North Carolina should control. And this conclusion is sanctioned by the weight of authority.<sup>1</sup>

*E converso*, if a case should arise wherein the law of the forum gives a *greater* exemption than that given by the *lex loci*, it would seem that the exemption would then become part of the obligation, to be governed by the *lex loci*. For if the *lex loci* should retrospectively increase the exemptions of the debtor, the obligation of the contract would be impaired; it being well settled that a state law, operating retroactively, which increases a debtor's exemption,

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<sup>1</sup> *Mooney v. R. R. Co.*, 60 Ia. 346, 14 N. W. Rep. 343; *Lyon v. Callopy*, 87 Ia. 567, 43 Am. St. Rep. 896; *Burlington, etc., R. R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497; *Stevens v. Brown*, 20 W. Va. 450; *Carson v. R. R. Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921; *East Tenn. R. R. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. Rep. 755; *Wabash R. R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74. In all these cases, the wages were not exempt at all under the law of the forum. In *Morgan v. Neville*, 74 Pa. St. 52, there was an exemption in the forum, but less than in the *locus contractus*. But see *contra*, *Singer M'fg Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613; *Drake v. R. R. Co.*, 69 Mich. 168, 13 Am. St. Rep. 382. These cases hold that the exemption is a matter of obligation, and should be governed by the *lex loci*, though there be no exemption in the forum.

impairs the obligation of the contract, and is violative of the federal constitution.<sup>1</sup>

The cases however have not generally made this distinction between the *greater* and the *less* exemption permitted under the *lex fori*, but have either favored the law of the forum or the proper law of the creditor's contract, independently of the relative amounts of exemption provided by the two laws respectively.

In conclusion, it is to be always remembered that the state of the forum, being sovereign within its limits, has the power (if it chooses to exercise it) to substitute its own law for that of any foreign state, and wherever the intent of the legislature of the forum to do so is clearly manifested, no other course is open to the courts of that state save to obey the legislative will.

Upon this ground, *Leroux v. Brown*,<sup>2</sup> and other cases of like kind, may be reconciled with the principles herein laid down.

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<sup>1</sup> See *Edwards v. Kearzey*, 96 U. S. 595.

<sup>2</sup> 14 Eng. L. & Eq. 247, 74 E. C. L. 800; *supra*.

## FRAUD AS AN ELEMENT OF UNFAIR COMPETITION.

NO branch of the law has undergone a more interesting development within the past fifty years than that which deals with the subject of unfair competition.<sup>1</sup> "A court of equity," remarks Judge Townsend in a recent case,<sup>2</sup> "keeps pace with the rapid strides of the sharp competitors for the prize of public favor and insists that it shall be won only by fair trade."

The general principle upon which one trader is granted relief against the sale of another trader's goods in such a guise or with such distinguishing marks as to deceive the purchasing public into accepting them as the wares of the first trader, was long ago stated by Lord Langdale, M. R.:<sup>3</sup>

"I think that the principle on which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

In the recent famous "Camel Hair Belting" case, Lord Chancellor Halsbury has crystallized the law of unfair competition in the following terse summary:<sup>4</sup>

<sup>1</sup> The phrase "unfair competition" throughout this article is intended to mean any passing off of one man's goods for another's, whether by a deceptive use of another's trade-marks or by other means. See Bradford, J., in *Dennison Mfg. Co. v. Mfg. Co.* (C. C. 1899), 94 Fed. Rep. 651 at 659: "The law of trade-marks is but part of the law of unfair competition."

<sup>2</sup> *R. Heinisch's Sons Co. v. Boker* (C. C. 1898), 86 Fed. Rep. 765 at 768.

<sup>3</sup> *Perry v. Truefitt* (1842), 6 Beav. 66. Lord Langdale summed up the principle even more briefly in *Croft v. Day* (1843), 7 Beav. 84 at 88: "It has been very correctly said that the principle in these cases is this, — that no man has a right to sell his own goods as the goods of another." So Turner, L. J., in *Burgess v. Burgess* (1853), 3 De G. M. & G. 896: "No man can have a right to represent his goods as the goods of another person."

<sup>4</sup> *Reddaway v. Banham*, [1896] A. C. 199 at 204.

"I believe the principle of law may be very plainly stated, and that is, nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence; and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact, the legal consequence appears to follow."

This proposition that "nobody has any right to represent his goods as the goods of somebody else" has been adopted as the basis of all the recent decisions<sup>1</sup> in England dealing with the passing off of one trader's wares as those of another.

In the United States the basic principle of relief in this class of cases is similarly stated. In 1877 Justice Clifford, in delivering the opinion of the Supreme Court in the case of *McLean v. Fleming*,<sup>2</sup> summed up the law in the statement that "Equity gives relief in such a case upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity." And in a recent unfair competition case before the Supreme Court, *National Elgin Watch Company v. Illinois Watch Case Company*,<sup>3</sup> Chief Justice Fuller, in speaking for the court, says tersely: "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

Taken by themselves, these various statements of the principle of relief against unfair competition would lead one to believe that the courts of last resort of both countries were in substantial accord. Yet a study of the application of that principle in specific cases reveals a striking difference. It appears that relief will not be given by the United States Supreme Court except in case of fraudulent intent on the part of the defendant; while in the English courts, as the law is to-day settled, it is immaterial whether the defendant's motive be fraudulent or innocent, once it is proven that the dress or the distinguishing marks of his wares deceive or are likely to deceive customers into purchasing his wares for and as the plaintiff's wares. To state accurately the principle of relief, as applied by the United States Supreme Court, it would seem that

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<sup>1</sup> For instance *Kekewich, J.*, in *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893 at 899.

<sup>2</sup> 96 U. S. 245 at 255.

<sup>3</sup> (1901) 179 U. S. 665 at 675.

Chief Justice Fuller's statement ought to read: "The essence of the wrong consists in the sale *with fraudulent intent* of the goods of one manufacturer or vendor for those of another." Whether or not this statement of the ground of relief is open to criticism is the object of inquiry in this article.

In order to clear the ground for discussion, it must be premised that courts distinguish between trade-marks proper, to which a trader may have an absolutely exclusive right in connection with a particular class of goods, and other distinguishing marks (words or symbols) to which a trader cannot acquire this exclusive right;<sup>1</sup> and this distinction is recognized, although it is frequently true of these last-mentioned marks that by long and exclusive use they acquire such an understood reference to the user's goods, that an unrestricted use of the same word or symbol by others in connection with similar goods inevitably leads to confusion and deception. In passing, it may be remarked that there seems to be a strong tendency to-day to admit that an exclusive right may be acquired in certain distinguishing devices which would have been held, some years ago, to be non-exclusive marks and open to all the world. The decisions upholding the plaintiff's exclusive right to a certain shape of bottle,<sup>2</sup> for example, seem to overthrow the old decisions that no exclusive right can be acquired in the mere shape or form of a package.<sup>3</sup> With less certainty, it may also be said, that in certain cases the courts to-day recognize an exclusive right to a color in connection with particular goods<sup>4</sup> — a view clearly at variance with the earlier authorities.<sup>5</sup> But even though the class of marks be broadening which are recognized as capable of exclusive appropriation, and as constituting what are variously termed "trade-marks" or "technical trade-marks" or

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<sup>1</sup> For an elaborate discussion of this distinction, and the authorities in support of it, see *Shaver v. Heller & Merz Co.* (C. C. A. 1901), 108 Fed. Rep. 821. See also *Dennison Mfg. Co. v. Mfg. Co.* (C. C. 1899), 94 Fed. Rep. 651.

<sup>2</sup> *Mt. Vernon Whiskey Bottle*, — *Cook & Bernheimer Co. v. Ross* (C. C. 1896), 73 Fed. Rep. 203. *Hires Root Beer Bottle*, — *Hires Co. v. Consumers' Co.* (C. C. A. 1900), 100 Fed. Rep. 809.

<sup>3</sup> *Moorman v. Hoge* (C. C. A. 1871), Fed. Cas. No. 9783; *Harrington v. Libby* (C. C. 1877), Fed. Cas. No. 6107; *Adams v. Heisel* (C. C. 1887), 31 Fed. Rep. 279; *Enoch Morgan's Sons Co. v. Troxell* (1882), 89 N. Y. 292.

<sup>4</sup> *Von Mumm v. Frash* (C. C. 1893), 56 Fed. Rep. 830; *Franck v. Frank Chickory Co.* (C. C. 1899), 95 Fed. Rep. 818; *Rains v. White* (Ky. 1899), 52 S. W. Rep. 970.

<sup>5</sup> *Fleischman v. Starkey* (C. C. 1885), 25 Fed. Rep. 127; *Faber v. Faber* (1867), 49 Barb. (N. Y.). 357; *Fischer v. Blank* (1893), 138 N. Y. 244; *Mfg. Co. v. Rouss* (C. C. 1889), 40 Fed. Rep. 585; *Mumm v. Kirk* (C. C. 1889), 40 Fed. Rep. 589.



"common law trade-marks,"<sup>1</sup> the line is still drawn between trade-marks proper and other distinguishing earmarks. The line of demarcation between what a trade-mark proper may and may not comprise is thus defined by Chief Justice Fuller in the "Elgin" case:<sup>2</sup>

"It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."

Yet it frequently happens that just such a sign or word as is here barred from the domain of technical trade-marks is adopted as a distinguishing mark by a trader, or perhaps fastened upon his goods by the public against his own intentions,<sup>3</sup> and in course of time becomes so associated with his goods as to acquire a secondary signification, and in connection with goods made or sold by him, to mean simply that goods so marked are his wares. This may be true of personal names, common to both the plaintiff and defendant; it may be true of geographical names of districts wherein both plaintiff and defendant raise or manufacture their products; it may be true of descriptive words which in their primary sense describe both plaintiff's and defendant's goods with equal accuracy.<sup>4</sup>

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<sup>1</sup> It should be noticed, perhaps, that in England, by reason of the statutes providing for registration of marks, the term "trade-mark" has become practically synonymous with "registered trade-mark."

<sup>2</sup> 179 U. S. 665 at 673.

<sup>3</sup> See the singular history of the adoption by the public of the name "Angostura Bitters" in *Siegert v. Findlater* (1878), L. R. 7 Ch. Div. 801, commented on by Putnam, J., in *Levy v. Waitt* (C. C. A. 1894), 61 Fed. Rep. 1008. See also the case of "Dolly Blue," *Edge v. Gallon* (C. A. 1899), 16 Rep. Pat. Cas. 509, *per* Lindley, M. R., at p. 514; and the notable "Bhe Hathi" case, *Orr v. Johnson* (1880), 13 Ch. Div. 434, and (1882) 7 App. Cas. 219, 221.

<sup>4</sup> For examples of a "secondary significance" which has been proven for a personal name, see *Clark Thread Co. v. Armitage* (C. C. A. 1896), 74 Fed. Rep. 936; *Baker v. Sanders* (C. C. A. 1897), 80 Fed. Rep. 889; *Massam v. Cattle Food Co.* (C. A. 1880), 14 Ch. Div. 748; *Valentine Co. v. Valentine Co.* (C. A. 1900), 17 R. P. C. 673; *J. & J. Cash, Ltd. v. Cash* (1901), 18 R. P. C. 213, (C. A. 1902), 19 R. P. C. 181. For a geographical name, *American Waltham Watch Co. v. United States Watch Co.* (1899), 173 Mass. 85; *Watch Co. v. Sandman* (C. C. 1899), 96 Fed. Rep. 330; *Heller & Merz Co. v. Shaver* (C. C. 1900), 102 Fed. Rep. 882, affirmed (C. C. A. 1901) 108 Fed. Rep. 821; *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508; *Montgomery v. Thompson*, [1891] A. C. 217; *Rockingham Ry. Co. v. Allen*, 12 Times L. R. 345;

When such words have once acquired this secondary meaning in connection with some one trader's goods, another trader cannot truthfully describe his goods by the same term, despite the fact that originally, and before the growth of the secondary meaning, he could have done so.<sup>1</sup> Yet it is clear that if a plaintiff's wares have come to be known as "Clark's Spool Cotton," for example, he cannot on that account absolutely enjoin another manufacturer or trader in spool cotton by the name of Clark from indicating in some way that he is the manufacturer or vendor of the cotton that he makes or sells. This other Clark will not be allowed to call his spool cotton "Clark's Spool Cotton," but in some way he will be allowed to indicate that he is the maker or the seller, as the case may be, of his goods. So where two persons make camel hair belting, but that phrase has come to have a secondary meaning denoting the belting of the first in the field, the second manufacturer will not be absolutely restrained from informing the world in some way that his belting is made of camel hair, so long as he does not do it in a way to confuse his belting with the plaintiff's. So in the case of a geographical name.

Relief in equity in the case of technical trade-marks is given by an absolute injunction against the further use of the infringing marks;<sup>2</sup> in the case of non-exclusive marks, which have come to be identified with the plaintiff's wares, by an injunction against the use of the marks (or words) in question without "clearly and unmistakably" distinguishing the defendant's wares from plaintiff's.<sup>3</sup>

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*Bewlay v. Hughes* (1898), 15 R. P. C. 290; *Worcester Royal Porcelain Co. v. Locke* (1902), 19 R. P. C. 479. For a descriptive name, *Singer Mfg. Co. v. June Mfg. Co.* (1896), 163 U. S. 169; *Fuller v. Huff* (C. C. A. 1900), 104 Fed. Rep. 141; *Wells, etc., Co. v. Siegel* (C. C. 1900), 106 Fed. Rep. 77; *Hansen v. Siegel-Cooper Co.* (C. C. 1900), 106 Fed. Rep. 691; *Reddaway v. Banham*, [1896] A. C. 199; *Draper v. Skerrett* (C. C. 1902), 116 Fed. Rep. 206.

<sup>1</sup> For language to this effect see, *per* Shipman, J., *Clark Thread Co. v. Armitage*, *supra*, at p. 943. See also the remarks of Lord Herschell and of Lord Macnaghten in the "Camel Hair Belting" case, [1896] A. C. 199, 212, 218, 219; Shiras, J., in *Heller & Merz Co. v. Shaver* (C. C. 1900), 102 Fed. Rep. 882, 889; Sanborn, J., in same case on appeal (C. C. A. 1901), 108 Fed. Rep. 821, 825; Hargis, C. J., in *Avery v. Meikle* (1883), 81 Ky. 73; 27 O. G. 1027, 1032.

<sup>2</sup> For a typical case, containing a thorough discussion as to the measure of the relief in technical trade-mark cases, see *Bass v. Feigenspan* (C. C. 1899), 96 Fed. Rep. 206.

<sup>3</sup> See the injunctions in the "Camel Hair Belting" case, [1896] A. C. 199, and the "Singer" case, 163 U. S. 169. In these cases of non-exclusive marks, it is said that whether defendant can continue to use the word in controversy, and yet surround it

It is clear then that the courts have marked out a boundary line between technical trade-marks or marks capable of exclusive

with sufficient safeguards to keep himself outside the scope of the injunction, is "a matter for his own consideration." *Per* Lord Watson in *Montgomery v. Thompson*, [1891] A. C. 217 at 222. The court will not undertake upon defendant's application to prescribe what differentiation is sufficient. *Hires Co. v. Consumers' Co.* (C. C. A. 1900), 100 Fed. Rep. 809 at 813; *Williams v. Mitchell* (C. C. A. 1901), 106 Fed. Rep. 168 at 172; *Sterling Remedy Co. v. Medical Co.* (C. C. A. 1901), 112 Fed. Rep. 1000 at 1002. The distinction necessary to avoid confusion depends on the circumstances of each case. "It may very well be that what is sufficient in the case of a wine producer may not be enough in the case of a brewer, and that which is perfectly adequate in the case of a brewer may prove to be quite inadequate in the case of a maker of pickles and sauces. The one point to be considered in each case appears to me to be whether the natural and probable result of the defendant's acts will be to mislead purchasers, and so deprive the plaintiff of business intended for him." *Per* Kay, L. J., in *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54, 64. If defendant's name is the same as plaintiff's, defendant must take greater pains to distinguish his goods from plaintiff's than would be required of a defendant of a different name. Paul, J., in *Baker v. Baker* (C. C. 1896), 77 Fed. Rep. 181, 186; Stirling, J., in *Brooks & Co. Ltd. v. Cycle Co.* (1899), 16 R. P. C. 523, 525. So, if certain leading features of plaintiff's and defendant's "get up" are common to the trade, defendant must take extra care to see that his distinguishing features really distinguish his goods. Lord Chancellor Hatherly in *Wotherspoon v. Currie* (1872), L. R. 5 H. L. 508, 514; Romer, L. J., in *Payton v. Snelling* (C. A. 1899), 17 R. P. C. 48, 56. See also Romer, J., in *Hodgson v. Kynoch, Ltd.* (1898), 15 R. P. C. 465, 473.

Such a distinction will necessitate giving up every *unnecessary* use of the term in controversy. *Baker v. Sanders* (C. C. A. 1897), 80 Fed. Rep. 889, 895; *American Waltham Watch Co. v. U. S. Watch Co.* (1899), 173 Mass. 85, 86; 43 L. R. A. 826, 830; *Fuller v. Huff* (C. C. A. 1900), 104 Fed. Rep. 141 at 144, 145; *Shaver v. Heller & Merz Co.* (C. C. A. 1901), 108 Fed. Rep. 821, 825, 826. See also *Montgomery v. Thompson*, *supra*, where it was held that an injunction in general terms would have restrained defendants' use of the phrase "Stone Ales." Similar language was used by Byrne, J., in *Worcester Royal Porcelain Co. Ltd. v. Locke* (1902), 19 R. P. C. 479, 490. In some instances, however, the use of the word in substantially the same way may be absolutely necessary to both the plaintiff and the defendant. The result will be that despite every possible safeguard with which the word can be surrounded, the fact of its use at all by defendant will tend to confuse defendant's product with plaintiff's. This was the case, for instance, with "Matzoon," an Armenian word which is the accurate and *only* name for a certain fermented milk beverage. So closely had it become identified with plaintiff's product that nothing short of a personal explanation to customers would serve to distinguish defendant's beverage from plaintiff's, despite a striking dissimilarity in labels and the prominence given defendant's name as manufacturer. *Dadirrian v. Yacubian* (C. C. A. 1899), 98 Fed. Rep. 872, 880. In such a case as this, therefore, the confusion that remains after defendant has done everything in his power to distinguish his goods from the plaintiff's, short of dropping altogether the word or name which is necessary to describe his product or to denote that he is the manufacturer, is *damnum absque injuria*. *Russia Cement Co. v. Le Page* (1888), 147 Mass. 206; *Singer Mfg. Co. v. June Mfg. Co.* (1896), 163 U. S. 169, 187; *Hygeia, etc., Co. v. Hygeia Ice Co.* (Conn. 1900), 45 Atl. Rep. 957, 960. The difficulty of determining in specific cases to what extent defendant's use of the word may be restricted is pointed out by Holmes, J., in *American Waltham Watch Co. v. U. S. Watch Co.*, *supra*, at page "6,

appropriation and other marks, chiefly words, which though incapable of being exclusively appropriated, may, by reason of long association with a particular trader's goods, be entitled to protection to the extent that another may not use them without "clearly and unmistakably" distinguishing his goods from those of the original user of the marks or words in question.

This brings us to the important inquiry: In what way, if any, does defendant's fraudulent intent to divert the plaintiff's trade affect the plaintiff's right to relief in respect of these two classes of marks? Is it essential to prove fraud in the one case but not in the other?

The English doctrine appears to-day to be clearly settled that it is unnecessary to prove fraud in either case. As early as 1838, Lord Chancellor Cottenham had before him a case of an innocent infringement of a plaintiff's trade-mark, and his decision was thus tersely delivered: <sup>1</sup>

"I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' mark — in short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names."

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and by Hammersley, J., in *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, *supra*, at page 959.

In some cases the court will require an express statement to be placed on the goods negating the idea that they emanate from the plaintiff. For example, defendants in *Brinsmead v. Brinsmead* (C. A. 1896), 13 Times L. R. 3, were restrained from using the word "Brinsmead" on pianos unless accompanied with an express statement that they were distinct from and had no connection with the old firm of John Brinsmead Sons. The order was approved by the Court of Appeals, and declared by A. L. Smith, L. J. (subsequently Master of the Rolls), to be, in his experience, a "common form." So in *Baker v. Sanders* (C. C. A. 1897), 80 Fed. Rep. 889, defendant was given his option of changing his labels or inscribing them prominently "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company." So in *Cream Co. v. Keller* (C. C. 1898), 85 Fed. Rep. 643, defendant was not allowed to use his name "Allegretti" unless accompanied by the statement "No connection with the original Allegretti of Chicago." So in *Penberthey Injector Co. v. Lee* (Mich. 1899), 78 N. W. Rep. 1074, defendant was enjoined from inscribing his injectors "W. Penberthey's Patent" unless accompanied by the statement that "W. Penberthey is distinct from and has no connection with the original Penberthey Injector Co." See also *Army, etc., Society, Ltd. v. Army, etc., Society of South Africa, Ltd.* (1902), 19 R. P. C. 574, 578. In the case of *American Waltham Watch Co. v. U. S. Watch Co.*, 43 L. R. A. 830, after enjoining the use of the word "Waltham" in the phrase "Waltham Watches," and further enjoining its use on the dial of defendant's watches, the court ordered the defendant to engrave on all its watch-plates, in collocation with the words "Waltham, Mass.," the inscription "A new Watch Company at Waltham, established 1885."

<sup>1</sup> *Millington v. Fox*, 3 Myl. & Cr. 338 at 352.

An injunction issued accordingly. This decision has ever since been regarded as law<sup>1</sup> and was quoted at length with approval by Lord Chancellor Halsbury in the case of *Cellular Clothing Company v. Maxton*.<sup>2</sup> In this latter case Lord Halsbury took pains to state emphatically his own understanding of the law as to the necessity of proving the defendant's fraudulent intent in cases involving descriptive words which have acquired a secondary meaning denoting the plaintiff's goods. He forcibly remarks, for example (p. 334):

"The only observation I wish to make upon that part of the argument is that it seemed to be assumed that a fraudulent intention is necessary on the part of the person who was using a name in selling his goods in such a way as to lead people to believe that they were the goods of another person. . . . It is not necessary to establish fraudulent intention in order to claim the intervention of the court."<sup>3</sup>

Later, in his opinion, he protests against the construction which had been placed upon his judgment in the "*Camel Hair Belting*" case to the effect that he had considered defendant's fraud essential to relief, and finally sums up the law as follows (p. 336):

"The simple proposition is this: that one man is not entitled to sell his goods under such circumstances, by the name or the packet, or the mode of making up the article, or in such a way as to induce the public to believe that they are the manufacture of some one else. The proposition that has to be made out is that something amounting to this has been done by the defendant, and if that proposition is made out the right to relief exists."<sup>4</sup>

The opposite view has been taken by the United States Supreme Court. Fraudulent intent, it holds, is necessary to relief in the case of both classes of marks, exclusive and non-exclusive alike.

<sup>1</sup> See Lord Chancellor Cairns' opinion in *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376, 391.

<sup>2</sup> [1899] A. C. 326 at 334, 335.

<sup>3</sup> Mr. Hopkins, in his recent book on "*Unfair Trade*," pp. 88, 89, seems wholly to have misunderstood the force and effect of Lord Halsbury's judgments in the "*Cellular Cloth*" and "*Camel Hair Belting*" cases. It would have been difficult for Lord Halsbury to have stated more emphatically that fraud was not necessary to relief.

<sup>4</sup> Lord Halsbury's statements have been quoted as settling the law in this respect by Kekewich, J., in *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893, 899, 901, and by Stirling, J. (now Lord Justice Stirling), in *Valentine Co. v. Valentine Co.* (1899), 17 R. P. C. 1. See also the language of Lord Macnaghten in *Payton v. Snelling*, [1901] A. C. 308, 310, and of Lord Davey in *Edge v. Gallon* (H. L. 1900), 17 R. P. C. 557, 566

Its view is well summed up in the following passage from Chief Justice Fuller's opinion in the "Elgin" case (p. 674):

"If the plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property<sup>1</sup> will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact or justify that inference from the inevitable consequences of the act complained of."

It is important to notice, however, that this entire quotation is really a *dictum*. The point decided, and alone calling for decision, was merely that inasmuch as the word "Elgin" was the name of the town in which both plaintiff and defendant carried on manufacture, and could not, therefore, be lawfully registered as a technical trade-mark, the federal courts (in absence of diversity of citizenship of the parties) had no jurisdiction of the alleged unfair competition resulting from defendant's use of the word. The decision of this point clearly called for no expression of

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<sup>1</sup> It is outside the scope of this article to discuss the propriety of regarding a technical trade-mark as "property." Such a mark is generally spoken of in this country as property. *Boston Diatite Co. v. Mfg. Co.* (1873), 114 Mass. 69; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* (1891), 138 U. S. 537 at 549; *Stonebraker v. Stonebraker* (1870), 33 Md. 252, 268. This view finds support in the opinions of Lord Westbury in *Edelsten v. Edelsten* (1863), 1 De G. J. & S. 185 at 199; *Wotherspoon v. Currie* (1872), 5 H. L. 508 at 522; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & S. 137 at 142; *Hall v. Barrows* (1863), 4 De G. J. & S. 150 at 159. See also Bacon, V. C., in *Ransome v. Graham*, 51 L. J. Ch. 897, 900. The accuracy of this conception has been questioned by Holmes, J., in *Chadwick v. Covell* (1890), 151 Mass. 190; by Lord Blackburn in *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376, 400; and by Lord Herschell in *Reddaway v. Banham*, *supra*, at p. 209. See also James, L. J., in *Singer Mfg. Co. v. Loog* (C. A. 1880), 18 Ch. Div. 395 at 412 (cited by Lord Macnaghten in *Reddaway v. Banham* at 216), Kekewich, J., in *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893 at 903, and Vaughan Williams, J., in *Jamieson v. Jamieson* (1898), 15 R. P. C. 169, 191. Lord Langdale, M. R., said long ago in *Perry v. Truefitt* (1842), 6 Beav. 66 at 73: "I own it does not seem to me that a man can acquire a property merely in a name or mark." The question, however, is largely, if not purely, academic. The practical results flowing from one or the other conception of a trade-mark are substantially the same. See Lord Herschell in *Reddaway v. Banham*, at p. 210; and Baker, J., in *Church & Dwight Co. v. Russ* (C. C. 1900), 99 Fed. Rep. 276, 279. See also 12 HARV. L. REV. 244.



opinion as to the degree of protection to be accorded a word "not in itself a good trade-mark" which had, however, acquired a secondary meaning with reference to plaintiff's wares; and of course called for no expression of opinion regarding the necessity of proving fraudulent intent in such a case, or even regarding the presumption of fraudulent intent in cases of technical trade-mark.

The danger of regarding *dicta* as precedents for later decisions has often been pointed out.<sup>1</sup> Yet the weight that attaches to the decisions of the Supreme Court almost unavoidably attaches even to the *dicta* delivered in the course of its opinions; and it is feared that in the present confusion of our state and federal courts as to the proper grounds of relief in cases of unfair competition, the foregoing statement may be accepted as authoritative. The danger is the greater because the above quoted *dictum* is by no means a unique expression of the Supreme Court on this point. In at least two prior cases, the Supreme Court, though not called upon to decide whether or not a fraudulent intention on defendant's part is essential to relief against his use of words or devices, not in themselves good trade-marks, has clearly indicated its opinion that such fraudulent intention must be made out.

In *Lawrence Manufacturing Company v. Tennessee Manufacturing Company*,<sup>2</sup> it was found that the letters "LL" used on cotton sheeting by plaintiffs — and, as appeared from the evidence, by a number of other manufacturers — "only indicated grade class or quality, and not origin, ownership, and manufacture," and therefore there was no technical trade-mark therein. In fact the court states explicitly (p. 551): "The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers." Having found that the brands of the parties were entirely dissimilar and that the particular letters in controversy were merely indications of quality and in no wise associated with goods of plaintiff's manufacture, it was clearly unnecessary for the court to discuss defendant's fraudulent intent. Yet the court considers (p. 549) plaintiff's contention that it is entitled "at least to an injunction upon the principles applicable to cases analogous to trade-marks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by the

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<sup>1</sup> *Cohens v. Virginia*, 6 Wheat. 264; *Carroll v. Carroll*, 16 How. 275.

<sup>2</sup> (1891) 138 U. S. 537 at pp. 542-545.

defendant by intentionally and fraudulently selling its goods as those of the plaintiff," and says with reference thereto that "undoubtedly an unfair and fraudulent competition against the business of the plaintiff — conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's — would, in a proper case, constitute ground for relief;" but that (p. 551) "*the deceitful representation or perfidious dealing* must be made out or be clearly inferable from the circumstances." The court finds that in the case at bar "there is no proof justifying the inference of fraudulent intent, or of deception practised on the plaintiff or on the public." This discussion is quite superfluous to the decision of the real point at issue, yet the case is repeatedly cited as authority for the doctrine that fraud is an indispensable element of unfair competition.

Again in *Coats v. Merrick Thread Company*,<sup>1</sup> where the defendants were alleged to have imitated the "labels, marks, and devices upon the spools" on which plaintiff's thread was wound and sold, the issue is defined as follows (pp. 565-566):

"The controversy between the two parties, then, is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance *as to indicate an intent* on the part of defendants to put off their thread upon the public as that of the plaintiff's and thus to trade upon their reputation."<sup>2</sup>

Throughout the case it is apparent that the fact of fraudulent intent is the crucial fact in the minds of the court. Yet the decision turns quite as much upon the fact that defendants had succeeded in clearly distinguishing their spool cotton, as upon the

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<sup>1</sup> (1893) 149 U. S. 562.

<sup>2</sup> The issue, it is submitted, is incorrectly stated in any view. Even if a fraudulent intent be considered essential to relief in the class of cases under consideration, it is nevertheless primarily necessary that the resemblance should be sufficient to show a likelihood of deceiving the ordinary purchaser. To narrow the issue in such a case to a mere fraudulent intent might result in enjoining a defendant who intended to defraud but whose marks were unsuited to deceive, and incapable therefore of injuring the plaintiff. This absurd result was actually reached in *Lever v. Bedingfield* (1898), 15 R. P. C. 453, but *Kekewich, J.*, was emphatically reversed in the Court of Appeals, 16 R. P. C. 3, 11, on the ground that fraudulent intent unaccompanied by actual deception or probability of deception would not support an injunction. For authorities to the same effect in this country, see *Kann v. Steel Co.* (C. C. A. 1898), 89 Fed. Rep. 706 at 713; *Centaur Co. v. Marshall* (C. C. A. 1899), 97 Fed. Rep. 785 at 788, 791; *Potter Drug & Chemical Corporation v. Soap Co.* (C. C. A. 1901), 106 Fed. Rep. 914, 915.

mere absence of a fraudulent intent.<sup>1</sup> The finding of the court that defendants had, aside from the features common to the trade,<sup>2</sup> clearly differentiated their goods, disposed of the case, and the discussion of defendant's fraudulent intention was superfluous.

The Supreme Court has never yet had a case before it which required a decision to the effect that defendant's marks or dress or devices which deceive the public to the plaintiff's injury, although not infringing any technical trade-mark of plaintiff's, can only be enjoined upon the further proof that defendant acted fraudulently in using them. But that this view is likely to be adopted, is clear from the frequent *dicta* of the court above pointed out. Moreover the same view is found expressed in many state and federal decisions.<sup>3</sup>

It must be admitted that the preponderance of authority to-day in this country is to the effect that in the absence of a technical trade-mark a plaintiff in a suit to restrain unfair competition must prove the defendant guilty of an actual fraudulent intent in order to obtain relief.

Yet it was long ago said by Mr. Justice McLean while sitting as Circuit Justice in the case of *Coffeen v. Brunton*,<sup>4</sup> that a label

<sup>1</sup> "The Supreme Court, in the case referred to (*Coats v. Thread Co.*), dismissed the bill upon the ground that intent on the part of the defendants to impose upon the public had been disproved by the defendants, and the dress of the goods adopted by the defendants bore so little resemblance to the dress adopted by the plaintiff that mistake could hardly be possible." Benedict, J., in *Von Mumm v. Frash* (C. C. 1893), 56 Fed. Rep. 830 at 838. See also similar comment in *Chemical Co. v. Meyer* (1891), 139 U. S. 540; by Sanborn, J., in *Shaver v. Heller & Merz Co.* (C. C. A. 1901), 108 Fed. Rep. 821, 827.

<sup>2</sup> There is of course no ground for relief in the confusion that results from *merely* such features in labels or dress as are commonly used by the trade. *Jamieson v. Jamieson* (C. A. 1898), 15 R. P. C. 169, 182, 184, 185; *Lever Bros. v. Beddingfield* (C. A. 1898), 16 R. P. C. 3, 10; *Payton v. Snelling* (C. A. 1899), 17 R. P. C. 48, 52; *Payton v. Ward* (C. A. 1899), 17 R. P. C. 58, 63, 67; *Alaska Packers Assoc'n v. Crooks* (1901), 18 R. P. C. 129; *Postum Cereal Co. v. Food Co.* (C. C. A.), 109 Fed. Rep. 898; *Hennessey v. Dompé* (1902), 19 R. P. C. 338, 340.

<sup>3</sup> For recent utterances to this effect see *Gorham Mfg. Co. v. Dry Goods Co.* (C. C. A. 1900), 104 Fed. Rep. 243; *National Elgin Watch Co. v. Illinois Watch Case Co.* (C. C. A. 1899), 94 Fed. Rep. 667, 670; *Elgin Butter Co. v. Elgin Creamery Co.* (1895), 155 Ill. 127; *Townsend, J., in Watch Co. v. Sandman* (C. C. 1899), 96 Fed. Rep. 330; *Baker, J., in Church & Dwight Co. v. Russ* (C. C. 1900), 99 Fed. Rep. 276, 279; *Wilkin, J., in Allegretti v. Allegretti Co.* (Ill. 1898), 52 N. E. Rep. 487. See too *Hargis, C. J., in Avery v. Meikle* (Ky. 1883), 27 O. G. 1027. It is said in *Daviess County Distilling Co. v. Martinoni* (C. C. 1902), 117 Fed. Rep. 186 at 188, that "the United States courts have repeatedly held the intent to deceive the public an indispensable element in the fraud charged in unfair competition."

<sup>4</sup> (C. C. 1849) Fed. Cas. 2. 946.

similar to plaintiff's label would be enjoined, whether the similarity were fraudulent or innocent. In the course of his opinion he traced the development of the English trade-mark law from the old case of *Blanchard v. Hill*,<sup>1</sup> decided by Lord Hardwicke in 1742, to the case of *Millington v. Fox*,<sup>2</sup> decided by Lord Cottenham in 1838. In the former case Lord Hardwicke refused to enjoin the use of the plaintiff's trade-mark by another because it was not shown to have been fraudulently used; in the latter case a fraudulent intent was held immaterial. Justice McLean continues:

"From the above it would seem that an intentional fraud is not necessary to entitle the plaintiff to protection; but that where the same mark or label is used which recommends the article to the public by the established reputation of another who sells a similar article and the spurious article cannot be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to believe that this is a correct view of the principle; for the injury will be neither greater nor less by the knowledge of the party."<sup>3</sup>

The same reasoning applies with equal weight to the case of the use of the words, or marks to which the plaintiff has no exclusive right, but which through long use and association have come to be intimately identified with his goods. The actual deception upon the public and the injury to the plaintiff's trade are no more and no less when the defendant's use of similar words and marks is innocent than when it is intentionally fraudulent. Even in this view, it would still be true that a plaintiff's right to enjoin the infringement of technical trade-marks and his right to enjoin defendant's use of marks and words "not in themselves good trade-marks," which, however, have become identified with plaintiff's goods, would be both "based on fraud," — if by "fraud" is to be understood a deception in fact, regardless of defendant's

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<sup>1</sup> 2 Atk. 484.

<sup>2</sup> 3 Myl. & Cr. 338.

<sup>3</sup> "A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law and doing nothing which the law forbids; or he may take it knowing it is the trade-mark of his neighbor and intending and desiring to injure his neighbor by so doing. *But in all these cases . . . the injury to the plaintiff is just the same.* The action of the court must depend upon the right of the plaintiff and the injury done to that right." *Per* Lord Chancellor Cairns in *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376 at 391. See also *Pardee, J., in Williams v. Brooks* (1882), 50 Conn. 278 at 282; *Hargis, C. J., in Avery v. Meikle* (Ky. 1883), 27 O. G. 1027, 1032.

intent, perpetrated upon the public to the injury of the plaintiff.<sup>1</sup> Such deception as we have seen above is to-day recognized by the English courts as an infringement of the plaintiff's rights and is enjoined accordingly, whether defendant's motive be innocent or fraudulent.

The Supreme Court, however, has not only distinctly and deliberately expressed its opinion in the "Elgin" case, that in the class of cases dealing with a word "not in itself a good trade-mark," "such circumstances must be made out as will show wrongful intent in fact or justify that inference from the inevitable consequences of the act complained of," but has also taken the position that in cases of the infringement of a strict trade-mark "the wrongful or fraudulent intent is to be presumed." These statements represent the extreme to which the court has gone in insisting on fraud as an essential element of unfair competition. If it were not for this latest expression of the Supreme Court, there would be good ground to hope that our federal and state courts might gradually swing into line with the English decisions. In the "Singer" case,<sup>2</sup> where the word "Singer," although descriptive in its primary sense of a class or type of sewing machines, did in a secondary sense mean sewing machines of the plaintiff's manufacture, the court defined the rights of the plaintiff and defendant in the use of the word, as follows:<sup>3</sup> The defendant may use the name for its machines with the fullest and freest liberty, "subject, however, to the condition that the name must not be so used as to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact." Although as a matter of fact the defendant in the "Singer" case was found to be acting fraudulently, this summing up of the law appears to exclude a fraudulent intent as a necessary element of unfair competition. According to the test here laid down, it would be necessary merely to show that the defendant's acts, whether his motive be fraudulent or innocent, "deceive the pub-

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<sup>1</sup> See Sebastian on Trade Marks (4th ed. 1899), p. 169. There is obviously an opportunity for confusion between this use of the phrase, "based on fraud," and the conception that the right to relief is based upon the *conscious* fraud of the defendant, that is, upon a deception knowingly and intentionally practised upon the public by the defendant to the plaintiff's hurt.

<sup>2</sup> Singer Mfg. Co. v. June Mfg. Co. (1896), 163 U. S. 169.

<sup>3</sup> Ibid. pp. 199, 200.

lic" (*i. e.*, into accepting defendant's goods as and for plaintiff's), and so "deprive others of their rights": that is, the infringement of complainant's rights by the deception of the public, regardless of the defendant's intent or motive, affords the ground for relief.

In the same year as the *Singer* decision, the Circuit Court of Appeals for the Second Circuit was called upon to determine the protection to be given the original user of the name "Hoff" in connection with malt against the use of the same name on bottled malt by a defendant also named Hoff.<sup>1</sup> At that time the *dictum* in *Lawrence Mfg. Company v. Tennessee Mfg. Company*, that in such cases the "deceitful representations" and "perfidious dealing" must be clearly made out, had not been approved and elaborated in the "Elgin" case, and the Court of Appeals in the "Hoff's Malt" case thus comments upon it:<sup>2</sup>

"Courts in such cases do not require proof of any peculiarly iniquitous 'perfidious dealing.' If the representation as to what or whose the goods are is calculated to deceive the purchaser into buying them as goods of the complainant, equity will enjoin the continuance, although the 'deceitful representation' was placed upon them carelessly or from lack of appreciation of the meaning it would convey to the purchaser, or from an honest mistake as to defendant's right to use it."<sup>3</sup>

There is, of course, still a possibility that when the question is squarely presented for decision before the Supreme Court, it may so far modify its *dicta* as wholly to exclude fraud as an element essential to relief, using the "Singer" and the "Hoff" cases as well as the English cases as authorities for such a result. With more probability, however, it may be hoped that the court, instead of insisting on a literal acceptation of its curiously strong phrase "perfidious dealing," will sacrifice the substance of the fraud required, retaining the shadow. The way is open to it.

It was said by Lord Morris, speaking for the Privy Council in *Cochrane v. MacNish*:<sup>4</sup>

"The respondents erred unwittingly at first. But as they persisted in their error after their attention was called to the fact that they were in-

<sup>1</sup> *Tarrant & Co. v. Hoff*, 76 Fed. Rep. 959.

<sup>2</sup> *Ibid.* p. 961.

<sup>3</sup> See also *Gray v. Taper Sleeve Pulley Works* (C. C. 1883), 16 Fed. Rep. 436, 442; *Manitowoc Co. v. Numsen* (C. C. A. 1899), 93 Fed. Rep. 196. The force of the expressions used by the Circuit Court of Appeals for the Seventh Circuit in the last-named case is very much weakened by its decisions in the later cases of *Illinois Watch Case Co. v. Elgin National Watch Co.* (C. C. A. 1895), 54 Fed. Rep. 667 and *Albany Paper Co. v. Hoberg* (C. C. A. 1901), 109 Fed. Rep. 589.

<sup>4</sup> [1896] A. C. 224 at 230.



fringing the appellant's rights, their conduct in the eye of the law amounts to fraud and they must be held responsible for the consequences."

In the famous trade-mark case of *Singer Machine Manufacturers v. Wilson*,<sup>1</sup> Lord Chancellor Cairns asserted that:

"What the motive of the defendant may be the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them."<sup>2</sup>

In this country, too, it has been similarly held that an innocent intention in adopting plaintiff's distinguishing marks is no defense, once defendant is shown to have persisted in their use after it has been pointed out to him that by so doing he is in fact passing off his goods as plaintiff's. For example, in *New England, etc., Company v. Marlborough, etc., Company*,<sup>3</sup> it was said by Holmes, J., in restraining the defendant's use of a label similar to the plaintiff's:

"It is found that the defendants did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It can hardly be doubted that they contemplated that the wholesale dealer at whose request they put up their awls in this form with full knowledge of the plaintiff's prior use would or might try to deceive the public, and whether they did or not is immaterial. They knew it after they were warned by the plaintiff and stood upon their rights."

And in the recent case of *Fuller v. Huff*,<sup>4</sup> in which defendants were enjoined from using the descriptive words "Health Food" as part of the title under which they carried on the business of making nutritious food-products, upon the ground that these words had become identified with the plaintiff's business and manufacture, it was said by Shipman, J., for the Court of Appeals:

"Although the intent of the defendant's principal when it commenced to use the name 'Health Food' may have been innocent, the continuance after it had learned of the complainant's prior use, indicates its deliberate

<sup>1</sup> (1877) 3 App. Cas. 376 at 391.

<sup>2</sup> See also *Mitchell v. Henry* (C. A. 1880), 15 Ch. Div. 181, 191; *Army, etc., Society v. Army, etc., Society of India* (1891), 8 R. P. C. 426; *Orr v. Johnston* (C. A. 1880), 13 Ch. Div. 434 at 454; *Hendriks v. Montagu* (C. A. 1881), 17 Ch. Div. 638 at pp. 646, 647, 651; *Chivers v. Chivers* (1900), 17 R. P. C. 420, 426; *Edge v. Gallon* (H. L. 1900), 17 R. P. C. 557, 566.

<sup>3</sup> (1897) 168 Mass. 154.

<sup>4</sup> (C. C. A. 1900) 104 Fed. Rep. 141 at 145 (Shipman, Wallace and Lacombe, JJ.).

intention to use the name without reference to the complainant's possible prior rights."

It is obvious that persistence after notice to desist may not constitute the moral turpitude, the conscious fraud, apparently demanded by *Lawrence Manufacturing Company v. Manufacturing Company*, *Coats v. Thread Company*, or the "Elgin" case. Oftentimes, the persistence may be the result of an honest opinion on defendant's part that his acts do not tend to pass off his goods as and for the plaintiff's. Yet, in the eye of the law, such a continuance in a course of conduct which he has been cautioned is an invasion of the plaintiff's rights, amounts to fraud; and if our courts are still to insist on fraud — presumed in the case of technical trade-marks and actual in other cases — as an essential element of unfair competition, it is to be hoped that they will be satisfied with proof of this "legal fraud" in place of actual fraudulent intent and "perfidious dealing" heretofore emphasized. Such an attitude, if once adopted, will enable the courts to apply the law of unfair competition to specific cases with much greater certainty. After a notice to desist, the only issue to be determined will be that of likelihood of deception of the public by the defendant's words and marks to the plaintiff's hurt. The defendant's secret intent or motive, always difficult to discover, as remarked by Lord Cairns in *Singer Machine Manufacturers v. Wilson*, *supra*, will no longer be a controlling factor. No longer will it be true that the same act accompanied by the same deception of the public and the same resulting injury to the plaintiff will be enjoined in the one case because the defendant intended that result, only to go unrestrained in another because the defendant was ignorant or skeptical that such would be the effect of his conduct. Even in cases of technical trade-mark it is important that this definition of fraud should obtain, for though conclusively presumed, for the purpose of relief by injunction, it may be nevertheless rebutted in exemption of damages.<sup>1</sup> Surely if a defendant uses plaintiff's marks after he has been warned of the consequences, his persistence in their use should be at his own risk and peril, and should be punished accordingly by an award of damages.<sup>2</sup>

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<sup>1</sup> "Elgin" case, 179 U. S. 665, 674; *Edelsten v. Edelsten* (1863), 1 DeG. J. & S. 185, 199.

<sup>2</sup> See Lord Blackburn in *Singer Mfg. Co. v. Loog* (1882), L. R. 8 App. Cas. 15 at 31.

Yet even then, our old friend "actual fraudulent intent," need not become wholly a supernumerary. In cases where direct evidence as to the likelihood of deception resulting from defendant's use of words or marks is evenly balanced, evidence of an actual fraudulent intent is important and material. The intent to deceive on the part of the defendant, once proved, is equivalent to an admission by him that the means he has adopted are likely to deceive; and where the court might be otherwise in doubt, this fact of fraudulent intent may well turn the scale against the defendant.

Thus it was said by Kekewich, J., in *Saxlehner v. Apollinaris Company*:<sup>1</sup>

"If in a case like the present, the defendants' goods on the face of them, and having regard to surrounding circumstances, are calculated to deceive, it seems to me that no evidence is required to prove the intention to deceive, nor ought time and money be expended on any such evidence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive. There can be no better evidence of intention to deceive than that of the deceiver himself, and this evidence may be given with equal force by admissions, oral or in writing, or by inference from conduct. If the intent to deceive be once established, it is but a short step, though it is a step and not an inevitable one, to the conclusion that the intention has been fulfilled and that the goods are calculated to deceive. I am by no means sure that any such distinction as I have just briefly formulated between the two classes of cases has ever been sanctioned by judicial authority, . . . but my notion is that it has nevertheless been observed in practice and that evidence of intent has only been used in the second class above noticed."

So it was said by Farwell, J., in *Chivers v. Chivers*:<sup>2</sup>

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<sup>1</sup> [1897] 1 Ch. 893, 900.

<sup>2</sup> (1900) 17 R. P. C. 420 at 427. In Lord Macnaghten's opinion in *Payton v. Snelling*, [1901] A. C. 308, it was intimated that a plaintiff would find it easier to prove probable deception by defendant's devices, if a fraudulent intent were established. Lord Macnaghten says (p. 310): "Now when a person comes forward to restrain a colorable imitation of this sort in a case like this, *and when he cannot prove that the defendants have tried to steal his trade*, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear — no man is entitled to sell his goods as the goods of another person."

In the "Cellular Cloth" case, [1899] A. C. 326, 335, Lord Halsbury explained the importance of the letter in *Reddaway v. Banham*, in which a jobber ordered belting

"Of course if the court finds as a fact that the man has a fraudulent intention, that finding may well be material because the fraudulent intention is evidence against the defendant of probable deception. . . . In other words, it does not lie in the mouth of a rogue when he is found to be a rogue as a fact, to say that his roguery was so clumsy that it could not possibly succeed."

One word in conclusion. Even though it be conceded that a defendant who has innocently and inadvertently passed off his goods as plaintiff's, or at least run the risk of so doing, by reason of similitude of names or marks, should be restrained from a continuance of such acts, it does not necessarily follow in case of the use either of plaintiff's technical trade-mark, or other distinguishing marks which may have become associated with the plaintiff's goods, that an innocent defendant must pay damages for the period prior to notice of the plaintiff's rights. It is thoroughly consistent and equitable, that a defendant who cannot set up absence of a fraudulent intent as a bar to an injunction, should be nevertheless allowed to prove it in exemption from damages or an accounting.

*E. R. Coffin.*

SCHENECTADY, January 1, 1903.

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from the defendants marked merely "Camel Hair Belting," without the addition of the defendants' names as manufacturers, not as evidence of fraud but as evidence against the defendants of the confusion likely to result from the omission of their names on "Camel Hair Belting." So too, Lord Blackburn in *Johnson v. Orr Ewing* (1882), 7 App. Cas. 219 at 230: "As against these defendants their own conduct is evidence, and I think their own conduct is such as to prove against them that the resemblance was calculated to deceive:" and again (p. 231), he speaks of the defendants' conduct "as evidence of an intention to mislead, or what I think is more the true question, as evidence of what the effect of the similarity was likely to be" (*i. e.*, deception of purchasers).

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**PRESIDENT'S POWER TO PARDON CONTEMPTS.** — In the Circuit Court of Appeals of the Eighth Circuit, Judge Sanborn has most vigorously assailed the proposition that "contempts of court are public offenses, pardonable like any other." He draws a very clear distinction between criminal or punitive contempt proceedings, *i. e.*, those conducted to preserve the power and vindicate the dignity of the courts, and proceedings which are civil, remedial, or coercive, *i. e.*, those instituted to protect and enforce the rights of private parties and to compel obedience to decrees made to enforce those rights. Though both classes of cases are discussed, the actual decision falls within the latter division. Two county judges were ordered by mandamus from a circuit court to levy a tax for the payment of a judgment recovered against the county. The judges refused, were imprisoned, and filed a petition for a writ of *habeas corpus*. The court refused to stay the proceedings in order to allow a petition to the President for pardon, holding that the commitment was not in execution of the criminal laws of the nation, but was to secure to a suitor his legal rights, and that therefore the President was without power to pardon. *In re Nevitt*, 117 Fed. Rep. 448 (C. C. A.).

The subject of presidential pardons is divisible by two intersecting lines of cleavage. One divides fines or forfeitures due to an individual from those due to the Government. Obviously this distinction is applicable to all cases, civil and criminal. The other line divides contempt proceedings from other cases; and notwithstanding the first distinction of Judge Sanborn noted above he strongly advises that the operation of the pardoning power be excluded from all contempt cases. Thus there are four possible

cases: (1) criminal convictions, with a fine payable to the United States; (2) criminal convictions with a fine payable to an individual person; (3) contempt commitments to vindicate the dignity of the court; (4) contempt commitments to enforce a decree in favor of an individual person.

Under the Constitution the President has power "to grant reprieves and pardons for offences against the United States, except in cases of Impeachment." And the power to remit fines and forfeitures, though not mentioned in the Constitution, is included under this general power. See RAWLE, CONST. 177; 1 BISHOP, CRIM. LAW, § 909. Clearly class (1) comes within this power. *Osborn v. U. S.*, 91 U. S. 474. With equal clearness class (4), into which falls the principal case, does not. *Hendryx v. Fitzpatrick*, 19 Fed. Rep. 810. In class (2), the decisions, though not harmonious and mostly decisions of state courts, indicate that the power does not exist, because its exercise would interfere with vested rights. See 1 BISHOP, CRIM. LAW, § 910. *Contra, United States v. Thomasson*, 4 Biss. (U. S. Dist. Ct.) 336. In class (3) the question squarely arises whether the judiciary or the executive shall be the final judge of the manner in which a court is to preserve its dignity and enforce obedience. A possible distinction might be made between cases where the defendant is punished for a past act and those where he is punished till he complies with the order of the court. It is arguable that in the one case he has passed out of the hands of the court, and so the President may deal with him as he pleases, whereas in the other he is still under the direct control of the court. But this refinement seems unwise and unnecessary. A preferable result is pointed out by the *dictum* of the principal case that the "executive cannot draw to himself all the real judicial power of the nation by controlling the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts."

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LIABILITY OF ASSIGNEE OF BILL OF LADING FOR DEFAULTS OF ASSIGNOR. — By a late decision in Mississippi an unusual responsibility is imposed on the purchaser of a draft with a bill of lading attached. *Russel v. Smith Grain Co.*, 32 So. Rep. 287. The case holds that a bank buying from the vendor of grain a draft to which a bill of lading is attached is liable for breach of warranty as to the quality of the grain. The doctrine of this case originated in *Landa v. Lattin*, 19 Tex. Civ. App. 246; and was followed in *Finch v. Gregg*, 126 N. C. 176. The reasoning of these two cases, which are precisely in point, the court adopts. The argument is that the assignee of a bill of lading attached to a draft gets the property in the goods and can therefore sue the purchaser on his contract with the vendor for the price; that since he gets the benefits of the contract he should be compelled to accept the burdens. It is doubtful if the assignee of a bill of lading given as security is anything more than a pledgee. If so, he would probably, according to the reasoning of the court, have no rights under the contract. See *Sewell v. Burdick*, 10 App. Cas. 74. But admitting that the court's premises are correct, the conclusion reached does not seem to be justifiable. It may be that when a vendor of goods assigns a bill of lading to secure payment of a draft, he intends to assign also his claim against the purchaser. But this should give the purchaser no reciprocal rights against the assignee, who has in no way agreed to carry out the vendor's contract. The strongest argument in support of the decision is that



the buyer has paid the draft and taken the bill of lading in the belief that he was getting such goods as he had ordered; so upon discovering his mistake of fact he should be allowed to rescind. This ground of recovery, however, has been held insufficient even when the bill of lading has in fact been forged, for the reason that the bank makes no representations as to the goods covered by the bill of lading. *Goetz v. Bank of Kansas City*, 119 U. S. 551. *Leather v. Simpson*, 11 L. R. Eq. 398. See DANIEL, NEG. INSTR., § 1734.

The principal case seems not only incorrect on principle, but likely to produce hardship in its practical application. In some cases the results might be exceedingly harsh. For example, since by the general rule the measure of damages for breach of warranty is the difference between the value of the goods as warranted and the actual value of the goods delivered, the damages might in some instances be more than the amount received by the bank. See SEDG. DAM., § 762. There is no authority directly opposed to the principal case; but those cases where recovery by the acceptor of the draft is denied although the bill of lading has been forged, seem in principle irreconcilable with it. The case is significant as showing the growth of what is deemed to be an unfortunate doctrine in the law.

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**SPECIFIC PERFORMANCE OF CONTRACTS TO PERFORM CONTINUOUS ACTS. —** By a recent decision in South Carolina a mandatory decree compelling a defendant to build and maintain a railroad station and keep a resident agent there was affirmed. The court thus not only gave specific performance of a contract to build, but also required the performance of continuous acts. *Murray v. Northwestern R. R. Co.*, 42 S. E. Rep. 617. This, it is often said, a court of equity will not do.

The reason why courts of equity will not give specific performance of contracts to build is commonly stated to be that they lack the power. See POMEROY, CONT., 2nd ed., §§ 307, 312. The real reason, however, would seem to be that there usually is a sufficient remedy at law; for the plaintiff can get damages and with them employ another contractor. See *Errington v. Aynesly*, 2 Bro. C. C. 343. When this reason fails, as it does in cases where the structure is to be on the land of the defendant and consequently no money damages will enable the plaintiff to erect it, a decree for performance issues. *Mayor v. Emmons*, [1901] 1 K. B. 515. The specifications as to the nature of the building must of course be reasonably definite. *Mayor v. Emmons*, *supra*. This relief, however, should not be deemed confined to cases where the plaintiff has granted land to the defendant as consideration for a promise by the defendant to build thereon, as is sometimes stated, for the relief is based on the broad doctrine that there is no adequate legal remedy. See *Stuyvesant v. Mayor*, 11 Paige (N. Y.) 426. These cases are but another application of that fundamental principle, and should not be considered exceptional.

As to the performance of continuous acts there is considerable conflict of authority. The majority of the decisions declare that a court of equity will not compel a defendant to perform a contract which requires the continuous employment of people, since a series of orders and a general superintendence would be necessitated. *Powell Duffryn Co. v. Taff Vale R. R. Co.*, L. R. 9 Ch. App. 331; *Blanchard v. Detroit Co.*, 31 Mich. 43. But the difficulty of enforcement seems to be exaggerated. To issue a series of orders

is no more than a court of equity is called upon to do whenever it undertakes to run a railroad by a receiver, and as to superintendence, the plaintiff may be depended upon jealously to take care of that. That equity may well give relief in such cases has been recognized in a number of decisions. *Joy v. St. Louis*, 138 U. S. 1; *Wolverhampton Co. v. London Co.*, 16 Eq. 433. They represent decidedly the better view, and are authority for declaring the principal case correct.

Where the contract to be enforced is, as in the principal case, that of a public service company, another point sometimes has to be considered. A railroad being a common carrier has duties towards the public. Any contract, therefore, which would seriously interfere with these duties a court of equity, in the exercise of its discretionary powers, should not enforce. Thus, where the full performance of the railroad's contract would hinder or endanger the public travel, the plaintiff should be left to his action at law. *Conger v. N. Y. Co.*, 120 N. Y. 29. And where the contract is to build a station at a particular point and at no other, since the free consideration of the public's convenience is thereby prevented, relief should be refused in equity, and for that matter, it seems, at law. *Williamson v. C. R. I. & P. R. R. Co.*, 53 Ia. 126. The principal case which involves no such question seems to have been correctly decided on principle, and is believed to represent the modern tendency of the law.

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RULES GOVERNING THE CREATION OF CONTINGENT REMAINDERS. — In spite of the vast learning that has from the earliest times been brought to bear on the law of real property, to make its rules and the reasons for them clear, several points have remained the subject of controversy. One point of dispute is whether there co-exists with the rule against perpetuities a separate and independent rule, that although an estate may be limited to an unborn person for life, a remainder cannot be limited to the children of such unborn person. In 1890 the Court of Appeal held that there was such a rule. *Whitby v. Mitchell*, 44 Ch. D. 85. Recently the Chancery Division refused to apply the rule to a similar limitation of personalty. *In re Bowles*, [1902] 2 Ch. 650. The decision is clearly correct, for there is existing authority that personalty may be appointed to an unborn child for life with remainder to unborn children. *Routledge v. Dorril*, 2 Ves. Jr. 357. Though the court in the principal case was satisfied to rest its decision on that authority, it questioned *obiter* the necessity for any rule other than the rule against perpetuities to govern the creation of remainders whether of realty or personalty.

Mr. Joshua Williams, upon whose authority the Court of Appeal relied in *Whitby v. Mitchell*, *supra*, was of opinion that the creation of contingent remainders is governed, not by the general rule of remoteness, but by an independent rule, namely, the rule against a possibility on a possibility. WILLIAMS, REAL PROP., 6th ed., 245. Professor John C. Gray has expressed the opinion that the creation of contingent remainders is, like the creation of other future interests, governed by the rule against perpetuities. GRAY, PERPETUITIES, §§ 285, 298. Mr. Justice Kay believed that it was governed by both rules. *Re Frost*, 43 Ch. D. 246, 253, 254.

The rule that a remainder to be good must depend on a common possibility, and not on a double possibility, was first enunciated by Chief Justice Popham in *Rector of Chedington's Case*, 1 Co. 153 a, 156 b. This

conceit though accepted for a time by Lord Coke was later definitely repudiated by him. *Blamford v. Blumford*, 1 Roll. R. 318, 321. Lord Chancellor Nottingham, too, said it had no basis in law. *Duke of Norfolk's Case*, 3 Ch. Cas. 29. In the middle of the eighteenth century, about eighty years after Lord Nottingham had settled the matter, the theory that successive remainders for life are invalid was first mentioned as an independent rule, *Spencer v. Marlborough*, 3 Bro. P. C., Toml. ed., 232. Lord Northington, however, admitted that he searched in vain for any reason for it as an independent rule. He did not refer it to Popham's doctrine. It is first traced to that doctrine by Lord Mansfield in *Chapman v. Brown*, 3 Burr. 1626, 1634. It received its strongest support in opinions by Mr. Booth and Mr. Yorke given in private practice. 2 Cas. & Op. 432, 435, 440. Mr. Williams at first did not accept the view. WILLIAMS, REAL PROP., 1st ed., 211, 212; but later adopted it. See WILLIAMS, REAL PROP., 3rd ed., 227, 406. Without further authority the Court of Appeal made the rule law in *Whitby v. Mitchell*, *supra*. It is submitted, then, that the rule has no sound basis in the law, for if it be considered that Lord Nottingham found it entirely without reason, and Lord Northington eighty years later searched in vain for reason for what he considered an independent doctrine, it seems impossible to contend successfully that the rule is older than the rule against perpetuities and that it has existed side by side with it. See GRAY, *supra*, §§ 125-134, 191-199, 285-298.

The idea that the creation of contingent remainders was not governed by the ordinary rule of remoteness seems to have been due to the fact that the danger of perpetuity was first felt in connection with executory limitations which were indestructible and which for a time furnished most of the cases. But, though the destructibility of contingent remainders may have kept questions of remoteness with regard to them from arising, it furnishes no sufficient reason for exempting the creation of them from the ordinary rule. See Gray, *supra*. Other circumstances that led to the idea that the creation of contingent remainders was outside the rule against perpetuities, were the fact that remainders are common law interests, and the belief that the rule was called into existence by the enactment of the Statute of Uses and the Statute of Wills. This, too, has been shown to be incorrect, for executory limitations of chattels real were known to the common law; and it was in connection with bequests of such interests that the rule against perpetuities was established. See GRAY, *supra*, § 296.

Since the rule against perpetuities governs all contingent equitable limitations, and all contingent limitations of personalty; and since contingent remainders are now by law indestructible, it seems highly desirable that the creation of contingent legal remainders should be subject to that rule, particularly as there is no large body of precedent to be overturned in order to establish the symmetry of the law.

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**RIGHTS IN PERCOLATING WATERS.** — It seems to be the general opinion that the law of percolating waters, though of recent development, is fairly well settled in accordance with the leading English case of *Chasemore v. Richards*, 7 H. L. Cas. 349. See GOULD, WATERS, § 280. It is interesting therefore to note in connection with a recent California case how entirely without support the English decision seems to be in the United States, and

how unanimous the few American cases have been in following a more equitable rule—a rule denying that the owner of land has an absolute property in the percolating water beneath it. *Katz v. Walkinshaw*, 70 Pac. Rep. 663.

The doctrine that the owner of land owns percolating water as he owns the rocks *usque ad infernos*, as it is said, grew out of the necessity of allowing him to drain, mine, or otherwise use his land even though the use should interfere with percolating waters; for since such waters are unseen and may underlie the whole soil, all use of the land might otherwise be prevented. But the rule as stated and applied, not only involves the inconsistency of allowing A, by digging on his own land and taking water from B's, to convert what it calls B's property, but also is open to the objection that it gives rise to a right greater than is necessary to secure to the owner the entire use of his land. There being a necessity to give him only a right to interrupt the water, it gives him an absolute right to the water itself. A good example of the injustice which may follow appears in the facts of a New York case where a city bought two acres in the midst of a farming district and completely ruined the lands in order that it might have water to sell. See *Forbell v. City of New York*, *infra*. The English rule in such a case would have given no relief. On the whole, therefore, it would seem better to hold to the general rule of waters and say that there can be no absolute property in percolating water. A careful reading of the decisions, neglecting *dicta*, would seem to show that percolating water may be *interrupted* by any act of the owner in the use and enjoyment of his property. *Acton v. Blundell*, M. & W. 324; *New Albany R. R. Co. v. Peterson*, 14 Ind. 112; *contra*, *Bassett v. Salisbury Manufacturing Company*, 43 N. H. 569. But that it may not be *used* except according to the usual law of waters. *Forbell v. City of New York*, 164 N. Y. 522; *Smith v. City of Brooklyn*, 46 N. Y. Supp. 141, 160 N. Y. 357; *Katz v. Walkinshaw*, *supra*. These cases confine the use of the water to use on the land and are believed to be the only American cases on the point. The English law, as has been said, is *contra*.

When the underground water flows in a defined and known course, the law universally holds that it may not be interrupted. See GOULD, WATERS, § 28. But when its course though defined is not known, the rule is the same as for percolating waters; the reason being that since these streams are unknown an owner digging in his own land cannot avoid interfering with them, and if such interference were held actionable many uses of land would become perilous if not impossible. The decisions therefore clearly allow him to *interrupt*. *Haldeman v. Bruckhart*, 45 Pa. St. 514. But although the argument for a different rule as to *use* is even stronger here, the English courts are consistent and refuse to recognize it. They seem to have no hesitation in allowing an owner to hunt for the source of his neighbor's spring and pipe it all off to the latter's damage. *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655. An American decision, however, is apparently *contra*. *Burroughs v. Satterlee*, 67 Ia. 396.

This view that percolating water may be interrupted by any enjoyment of the land, but may not be used except in a reasonable manner, has, it is believed, the merit of securing the use of the land to its owner, and the use of the water, so far as is practicable, to all whose land it touches.

ORIGIN OF DUTY NOT TO CAUSE HOMICIDE BY AN OMISSION. — In cases of homicide by an omission, rather than by a positive act, the criminal law has not yet definitely settled the nature of the defendant's duty. One way in which a legal duty may originate is illustrated in the recent English case of *Rex v. Pitwood*, 19 T. L. R. 37. The case is peculiarly interesting, since on the facts it directly overrules *Regina v. Smith*, 11 Cox C. C. 210. It holds that where, through a gate-keeper's negligent failure to close the gates, a person on the track is killed by a train the gate-keeper is guilty of manslaughter. The court argues that the defendant's criminal liability grew out of the contractual duty existing between himself and the railroad. The decision seems to be sound, and several other cases seem to adopt a similar view of the origin of the legal duty. *Regina v. Lowe*, 3 C. & K. 123; *Regina v. Hughes*, 7 Cox C. C. 301.

The legal duty in cases of this kind may arise in at least three ways. The first of these is illustrated by the principal case. Secondly, the duty may be imposed by statute. *Regina v. Downes*, 13 Cox C. C. 111. See *Regina v. Middleship*, 5 Cox C. C. 275. Thirdly, the weight of authority seems to hold that whenever a person has undertaken to perform any act, even gratuitously, so that others in reliance thereon have changed their position, a legal duty arises toward them. *Regina v. Marriott*, 8 C. & P. 425; *United States v. Knowles*, Fed. Cas. 15, 540. *Contra, Regina v. Shepherd*, 9 Cox C. C. 123. The principal case probably comes within this class also. In fact the element of reliance would seem to be present in most of the cases where the duty is regarded as arising from the contract. This third rule is subject to two extensions. Where one person relying on the defendant has placed another in a position of dependence on him, a duty arises. For example, if in the principal case a father, relying on the defendant, had driven on the crossing with his child, the defendant would be responsible for the child's safety independently of the contract. There seem to be no cases directly covering this point, but it falls within the spirit of the rule. Secondly, where the injured party is incapable of reliance, but his position has been changed by the defendant in pursuance of some undertaking to protect him. This covers undertakings to care for idiots and very young children. The cases are in conflict on this point, but the better view seems to favor the defendant's liability, since he has by his own act changed the injured party's position and assumed responsibility for his safety. *Regina v. Nicholls*, 13 Cox C. C. 75; *contra, Rex v. Smith*, 2 C. & P. 449.

The only cases of liability for manslaughter from an apparent omission which are not included in one of the classes suggested seem to be those where a man has undertaken to control a dangerous force. He then must not negligently allow it to injure anyone. See WHARTON, HOM., § 87. Such cases are nearly akin to those where there has been some positive act. The person by taking the dangerous force into his control has made it his, and is responsible for it.

The adoption in full of these rules of legal duty would not greatly extend criminal liability in view of the standards of negligence in criminal law. The criminal law requires a man to act with no greater degree of care than a person of his standard of capacity would consider proper. Further, to render a defendant liable, such reckless negligence must be proved as to show a criminal state of mind. *Regina v. Noakes*, 4 F. & F. 920. Subject to such limitations, broad standards of responsibility may safely be adopted.



RECOVERY BY PARENT FOR SEDUCTION OF CHILD. — Technically, even to-day, the common law action for seduction is not analogous to, but identical with the old action for disabling or enticing away a servant, and is founded purely on the relation of master and servant presumed to exist between parent and child. *Grinnell v. Wells*, 7 M. & G. 1033. In substance, however, the action is based on the injury to the happiness and reputation of the plaintiff and his family. *Terry v. Hutchinson*, L. R. 3 Q. B. 62; *Emery v. Gowen*, 4 Me. 33. The courts, nevertheless, are unanimous in insisting on the formal though oftentimes fictitious relationship of master and servant to give the plaintiff standing in court. The hardship which results from this requirement is illustrated by a recent Irish case. A daughter was seduced and made pregnant during her father's lifetime. The father died two months before her confinement, and her mother brought suit. No recovery was allowed, because the seduced person was not the plaintiff's servant at the time of seduction. *Hamilton v. Long*, 36 Irish L. T. R. 189.

The same technical difficulty stands in the way of justice in other cases of more frequent occurrence. When, for example, the daughter is serving in a household other than her father's, she ceases to be his servant. If then she returns to him after her seduction but before her confinement, he can in England have no recovery. *Dean v. Peel*, 5 East 45. In this country the courts have avoided this unfortunate result where the seduced person is a minor, by holding that the right at any time to reclaim her services is enough to continue the relation of master and servant and sustain the action. *Martin v. Payne*, 9 Johns. (N. Y.) 387. This extension of the English rule is good as far as it goes; but it lets the wrongdoer escape where his victim is of age, *Nickerson v. Stryker*, 10 Johns. (N. Y.) 115; also where she is a minor bound out as apprentice, *Dain v. Wycoff*, 7 N. Y. 191; or where, as in the principal case, the father dies after the seduction but before the presumed loss of service. It is suggested that the injustice of the English rule might be avoided without departing from the technical foundation which all courts require for the action. This would be accomplished if the test of liability were made the relation of the victim to the plaintiff at the time, not of seduction, but of confinement. It must be admitted, however, that only two cases have been found which adopt this test. *Coon v. Moffit*, 3 N. J. Law 169; *Parker v. Meek*, 3 Sneed (Tenn.) 29. And it has been disapproved of, expressly or impliedly, in numerous other decisions. *South v. Denniston*, 2 Watts (Pa.) 474; *Bartley v. Richtmyer*, 4 N. Y. 38. It is argued that a master could not recover for the beating of a servant before he became his servant, since the loss is due to his own folly in hiring a disabled person. This is true; but in the principal case the daughter is the plaintiff's servant, not by a subsequent contract, but merely by virtue of residence with her. More analogous to the principal case is one where A hires B, the term of service to begin on the termination of B's service with C, and B is beaten and disabled just before the end of the first service. No one can say that in such a case the courts would not have given A an action for services lost. The injury would be greater than if the beating took place after the term of service began. So in the principal case the plaintiff's wrong is as real as if her daughter had been her servant at the time of seduction. Although the weight of authority does not accept the test suggested, it seems deserving of recognition, for it accords with the modern tendency of the law to regard not so much the formal as the substantial basis of an action.



**JUSTIFICATION FOR PROCURING BREACH OF CONTRACT.** — A question of great practical importance has been discussed recently in the English courts. A labor union by threatening a strike forced a business firm to break its contract with an apprentice, and when sued by the latter justified its action on the ground of a prior contract with the firm forbidding such employment. The court refused to allow the plea. *Read v. Friendly Society of Operative Stonemasons*, 19 T. L. R. 20 (Eng., C. A.).

In considering the question of justification which the case raises, it is essential to distinguish and exclude interference that merely prevents the formation of contracts. Cf. *Bulcock v. St. Amé's Master Builders' Federation*, 19 T. L. R. 27. Whatever motives and methods may be thought legally permissible in such cases, it seems clear that one who knowingly procures the breach of an existing contract has committed a legal wrong and should be *prima facie* liable. He has intentionally destroyed a property right, and the burden should be upon him to show justification; not upon the plaintiff to show some additional element of illegality such as actual malice. See *Quinn v. Leatham*, [1901] A. C. 495 at 510; but see also *Brown Hardware Co. v. Ind. Stove Works*, 69 S. W. Rep. 805; 16 HARV. L. REV. 228. What will constitute such justification has not, however, been satisfactorily determined. Assuming that the means used be legal the test must be found in the defendant's motive. It is submitted that the line should be drawn between action prompted by self-interest or malice toward the plaintiff, and that honestly prompted by the interest of the public or of the party influenced. See *Bowen v. Hall*, 6 Q. B. D. 333 at 338; *Glamorgan Coal Co. v. South Wales Miners' Fed.*, *infra*. A typical case of the latter class is that of a brother persuading a sister to break her engagement with an unworthy fiancé. A further instance is found in the case of public-spirited interference to prevent the building of bridges by unreliable men. There is a close analogy between this principle and that of privilege in defamation as applied to communications made in the interest of the recipient or of the public. On the other hand justification is lacking not only in cases of actual malevolence toward the plaintiff, but also in cases of mere self-interest. The latter motive though it will not make a legal act illegal cannot be considered "just cause or excuse" for a *prima facie* tort. It follows from this that employers and labor unions cannot procure the breach of existing contracts without rendering themselves legally liable. The decision of the principal case disallowing the special plea of prior contract is in harmony with the classification suggested. See *Curran v. Galen*, 152 N. Y. 33. A close case under this theory was lately presented in England. Labor leaders, acting under special authority given by the men, ordered a "stop day" involving breach of contract. They were held justified on the ground that they had acted solely for the best interests of the men. *Glamorgan Coal Co. v. South Wales Miners' Fed.*, 18 T. L. R. 810. A different decision might well have been reached, even assuming that disinterested citizens whose counsel was sought could have legally advised breach of contract. It is understood that this case is to be appealed.

When illegal means are used the question is very different. It would seem that justification could not cover the use of threats, coercion, or deceit, even in the extreme case suggested of the brother and sister. Here again the analogy to slander is seen; the defense of privilege is limited and may be rebutted. Combination for action otherwise justifiable raises a question too broad for discussion here.

**PRIVILEGE OF ACCUSED AGAINST CORPORAL EXAMINATION.** — An illustration of the tenderness for the accused shown by the courts of to-day, is furnished in a recent Iowa decision. Testimony of physicians who had made a compulsory physical examination of a prisoner charged with rape was held inadmissible on the ground of privilege. *State v. Height*, 91 N. W. 935. The limits of the rule that the accused may not be compelled to give evidence tending to incriminate himself must be determined largely by the reasons on which the rule is based. Two distinct grounds have been suggested, that of mercy toward the prisoner, and that of the unreliability of evidence thus obtained. On the latter ground, it is urged with much force that if the accused himself be compelled to take the witness stand, his testimony will be untrustworthy, being given under bias; and further, that a skillful cross-examination may entrap him into apparent admissions and confessions which may mislead the jury. This reasoning obviously does not apply to cases of search or inspection or exhibition of the person, in which the reliability of the evidence depends on others than the accused. The other ground, however, that of mercy, while not a weighty consideration in the administration of the law at the period when the privilege originated, is perhaps the strongest element in its support to-day. From this point of view the question is mainly as to the extent to which the guilty should be shielded. The innocent do not need to claim privilege in these cases, and their inconvenience will be slight. See 5 HARV. L. REV. 71. Since the purpose of the trial is to secure justice, the demands of mercy are surely satisfied by the exemption of the accused from testifying by word of mouth or in writing, and any further concession is unwise.

It is well settled that the privilege will not be granted when the prisoner in court is asked to rise or to uncover his face for purposes of identification. *State v. Reasby*, 100 Ia. 231; *State v. Prudhomme*, 25 La Ann. 522. But the weight of authority is probably that he need not submit to a much more extended inspection. *Day v. State*, 63 Ga. 667; *People v. McCoy*, 45 How. Prac. (N. Y.) 216; *contra*, *Walker v. State*, 7 Tex. App. 245; *State v. Ah Chuey*, 14 Nev. 79. There seems no valid distinction between compelling the prisoner to uncover his face and to uncover his tattooed arm for identification, nor, aside from the requirements of decency, between inspection in and inspection out of the court room. It is true that one who is accused of crime has not lost his personal rights, and he should be protected against public indignity in the court room and inhuman treatment outside. But not even an examination by physicians is so degrading that protection against it is necessary at the possible cost of justice. Subject to the exception just mentioned, it seems clear that a prisoner should not be allowed to conceal the evidence of his guilt under the plea of privilege. Justice and common sense should control mercy.

## RECENT CASES.

**AGENCY — NONFEASANCE BY AGENT — LIABILITY TO THIRD PARTIES.** — The plaintiff was injured through the negligence of the defendant, a real estate agent, in failing to keep in proper repair certain premises of which he had been given the entire control by the owner. *Held*, that the plaintiff could recover from the agent. *Lough v. Davis & Co.*, 70 Pac. Rep. 491 (Wash.).

The defendant could not be held by a third party, on any doctrine of agency, for mere failure to perform a duty to his principal. *Hill v. Caverly*, 7 N. H. 215. But an agent, like anyone else, may be liable for misfeasance, and an otherwise lawful act, if performed without taking proper precautions, may by reason of this omission become a misfeasance. *Bell v. Fosselyn*, 3 Gray (Mass.) 309. Accordingly, if the injury to the plaintiff resulted from wrongfully letting the premises without repairing them, the defendant may have been rightfully held. But the court bases its decision upon the doctrine that anyone who is exercising entire control over property, in place of the owner, thereby incurs the common law obligations of an owner toward the public. Such a principle would be a striking development in the law of tort liability, for it is unwarranted by the authorities. *Delaney v. Rochereau*, 34 La. Ann. 1123. It is perhaps defensible, however, as a matter of policy, and it accords with language used in several similar cases. See *Baird v. Shipman*, 132 Ill. 16.

**BANKRUPTCY — EFFECT OF NATIONAL ACT UPON STATE LAWS.** — Proceedings in involuntary bankruptcy under a state law were begun against a mining corporation. A judgment creditor of the corporation petitioned for a writ of prohibition to prevent the state court from assuming jurisdiction, on the ground that the state law was suspended by the national act of 1898. *Held*, that the writ will not issue, since the act of 1898 does not apply to mining corporations and the state law is consequently still in force as regards them. *Herron Co. v. Superior Court, etc., of San Francisco*, 68 Pac. Rep. 814 (Cal.).

State laws which are properly bankruptcy acts are to be distinguished from isolated statutes not forming part of any regular system of bankruptcy, although having to some extent similar objects. See 14 HARV. L. REV. 541. The latter class of laws are not suspended by the passage of a national act. *Steelman v. Mattix*, 36 N. J. Law 344. The former, however, according to what seems the better view, are entirely suspended as regards cases in which proceedings might be had under the national act. *Ketcham v. McNamara*, 72 Conn. 709. It would seem that the same result should be reached in those cases which, like the principal case, do not fall within the scope of the national act. LOWELL, BANKR., § 9; *contra*, *Shepardson's Appeal*, 36 Conn. 23. The contrary view leaves the states such freedom to make new provisions concerning the commission of acts of bankruptcy and regarding other subjects upon which Congress has chosen to remain silent as practically to nullify the power of Congress "to establish uniform laws on the subject of bankruptcies," contemplated by the Federal Constitution. It is submitted that the principal decision is unfortunate as involving this result.

**BANKRUPTCY — PROVABLE CLAIMS — FUTURE RENT.** — *Held*, that adjudication in bankruptcy terminates the existing relation of landlord and tenant so that a claim for rent accruing after the adjudication will not be allowed though the tenant had executed promissory notes therefor. *In re Hays, etc., Co.*, 117 Fed. Rep. 879 (Ky., Dist. Ct.). For a discussion of the principles involved, see 14 HARV. L. REV. 457.

**CARRIERS — REGULATION OF FARES BY MUNICIPALITY — TRANSFERS.** — By its charter the City of Chicago was given power to regulate the charges of street railways. In pursuance of this power, §§ 1723 and 1725 of the Revised Code of the City were passed requiring street railways to issue transfers entitling passengers to ride on a connecting line of the same company without payment of an additional fare. *Held*, that this is a reasonable regulation and is valid. *Chicago Union Traction Co. v. City of Chicago*, 65 N. E. Rep. (Ill, Sup. Ct.) 451.

The legality of the ordinance was contested on two grounds: first, that the municipality had no authority to pass such an ordinance; and secondly, that it was an impairment of the obligation of a contract. The decision of the court on the first contention would seem to be correct. That a state may regulate the rates charged by common carriers is too well established to admit of question. *Chicago, etc., R. R. Co. v. Iowa*,

94 U. S. 155. This power the state may exercise through agents appointed by it. *Chicago, etc., R. R. Co. v. Minnesota*, 134 U. S. 418. It would seem to follow then that a municipality having, by direct authority of the state, power to set a maximum rate of fares, may set the rate for carriage over two lines operated by the same company, as well as over one. It is a mere incident to the latter power to require the issue of a transfer. Nor is this regulation so unreasonable as to warrant judicial interference. *Chicago, etc., R. R. Co. v. Wellman*, 143 U. S. 339. The precise point of the principal case, it seems, has not hitherto been decided. The question involved in the second contention has been fully discussed in 16 HARV. L. REV. 1.

CONSTITUTIONAL LAW — DUE PROCESS — SPECIAL ASSESSMENTS. — The Massachusetts Statutes of 1867, c. 106, provide for building sewers in the city of Worcester and the assessment of the proportionate share of the cost upon "every person owning real estate upon any street, etc., or whose real estate may be benefited thereby." *Held*, that the statute is constitutional. *Smith v. Worcester*, 65 N. E. Rep. 40 (Mass.).

The statute involved in the principal case might seem to fall within the class already declared unconstitutional by the Massachusetts court because by authorizing an assessment of the entire cost of a local improvement on the estates benefited, it might cause the tax on any single estate to exceed the benefits conferred. *Sorden v. Coffey*, 178 Mass. 489; *cf. Norwood v. Baker*, 172 U. S. 269. But since it already had been declared a valid exercise of the taxing power, the court hesitated to reverse the earlier decision. *Butler v. City of Worcester*, 112 Mass. 541. The court therefore makes a distinction between statutes of "general future application" and those in which the legislature may be supposed to have acted in view of a specific scheme. In the former class of statutes, of which that in the principal case might seem to be one, the court would follow its latest decisions and declare them unconstitutional. But in the latter, within which the statute in question was considered to be, the statute will be supported provided the resulting assessment is not in substantial excess of the benefits conferred. The decision furnishes an indirect means for the Massachusetts court to follow the United States' decisions limiting *Norwood v. Baker*. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; see 15 HARV. L. REV. 307.

CONSTITUTIONAL LAW — NATURALIZATION — JAPANESE NOT ELIGIBLE TO CITIZENSHIP. — A statute provides that applicants for admission to the bar shall be citizens of the United States. 2 Hill's Stat. of Wash., sec. 92. An applicant produced a certificate of naturalization from a county court, which showed him to be a native and former citizen of Japan. *Held*, that a Japanese is not eligible to citizenship in the United States and that the judgment of naturalization may be collaterally attacked. *In re Takuji Yamashita*, 70 Pac. Rep. 482 (Wash.).

The power to regulate naturalization is vested exclusively in the federal government. Const. of U. S., Art. I. sec. 8; *Thurlow v. Massachusetts*, 5 How. (U. S. Sup. Ct.) 504, 585. The first naturalization act provided for admission to citizenship of "free white persons," only, Act of Apr. 14, 1802, but by amendment the privilege was extended to persons of African nativity and descent. Act of July 14, 1870, c. 254, § 7. The term "white" in these acts has been generally construed to include only the Caucasian race, and accordingly Chinese, Hawaiians, Burmans, and Canadian Indians have been refused naturalization. *In re Ah Yup*, 5 Saw. (U. S. Circ. Ct.) 155; *In re Kanaka Nian*, 6 Utah, 259; *In re Po*, 28 N. Y. Supp. 383; *In re Camille*, 6 Fed. Rep. 256. On the other hand, one apparently a Mexican Indian was admitted to citizenship. *In re Rodriguez*, 81 Fed. Rep. 337. But this decision, if correct, might be rested upon peculiar naturalization treaties with Mexico. See Treaty, Feb. 2d, 1848. A statute passed in 1882, U. S. Comp. St. 1901, sec. 2169, forbidding the naturalization of Chinese has been considered as merely declaratory of existing law. *In re Po*, *supra*. The conclusion in the principal case seems therefore correct. It is sustained by the only decision found upon the exact point. *In re Saito*, 62 Fed. Rep. 126. Since the naturalization record showed that upon the facts found the county court had no right to grant the certificate, a collateral attack upon this judgment void on its face was rightly allowed. *In re Hong Yen Chang*, 84 Cal. 163; *In re Gee Hoop*, 71 Fed. Rep. 274.

CONSTITUTIONAL LAW — PRESIDENT'S PARDONING POWER FOR CONTEMPT OF FEDERAL COURT. — Two county judges were committed for contempt for disobeying a writ of mandamus from a circuit court ordering them to levy a certain tax for payment of a judgment. They sought a writ of *habeas corpus*, pending a petition to the President for pardon. *Held*, that the President has no power to pardon, and therefore the writ is denied. *In re Nevitt*, 117 Fed. Rep. 448 (C. C. A., Eighth Circ.). See NOTES, p. 291.

CONSTITUTIONAL LAW — SPECIAL PRIVILEGES — EXCEPTION OF LABOR UNION FROM LAW AGAINST COMBINATIONS. — A Nebraska statute, Comp. St. 1901, c. 91 a, making combinations in restraint of trade illegal, expressly excepted labor unions from its operation. *Held*, that the statute does not violate the provision of the state constitution, forbidding the grant of a special privilege or immunity. *Cleland v. Anderson*, 92 N. W. Rep. 306 (Neb.).

The exception from the operation of a statute of certain members of the class dealt with does not, *ipso facto*, render the statute unconstitutional. The test is whether there is a reasonable need, based upon public welfare, for a different treatment of the members excepted. *Am. Sugar Refining Co. v. Louisiana*, 179 U. S. 89; *Magoun v. Ill. Savings Bank*, 170 U. S. 283. The growing favor with which the law has come to regard combinations of labor, tends to show the reasonableness of the exception made by the Nebraska statute. At common law combinations of laborers to raise wages, were by early decisions held illegal along with other combinations in restraint of trade. *The King v. Journeymen-Tailors*, 8 Mod. 11; *People v. Fisher*, 14 Wend. (N. Y.) 9. But of late years this form of combination has been considered less harmful. Strikes were declared lawful in England by statute, 34 & 35 Vict. c. 32, and in this country by the courts themselves. *Commonwealth v. Hunt*, 4 Met. (Mass.) 111; see *Curran v. Galen*, 152 N. Y. 33. Moreover, the action of the legislature, as indicative of public need, should be given great weight. It would seem, therefore, an unusually strong case for the application of the rule that a statute should be held constitutional unless it is clearly bad. See COOLEY, PRIN. CONST. L. 159. It is interesting to note that this same statute was held by the Federal Circuit Court to contravene the Fourteenth Amendment. *Niagara Ins. Co. v. Cornell*, 110 Fed. Rep. 816.

CONTRACTS — PAYMENT FOR LAND BY INSTALLMENTS — MEASURE OF DAMAGES. — The defendant contracted to purchase certain lots from the plaintiff and to pay for them by installments. After the last installment had fallen due the plaintiff brought an action for the full contract price but without tendering a deed of the land. *Held*, that the plaintiff could recover all except the last installment. *Gray v. Meek*, 64 N. E. Rep. 1020 (Ill., Sup. Ct.).

Where several installments are due under a contract they constitute ordinarily but one indivisible cause of action. *Barrett v. Belfy*, 47 Conn. 323; *Reformed, etc., Church v. Brown*, 54 Barb. (N. Y.) 191; *Jarrett v. Self*, 90 N. C. 478. But in the principal case the failure of the plaintiff to tender a deed of the land constituted a defense for the failure to pay the last installment which did not exist for the prior defaults. Under these circumstances the Illinois courts hold that the plaintiff may waive his right to the last installment and collect the others. *Duncan v. Charles*, 5 Ill. 561. But the more general and better doctrine seems to be that if the plaintiff has not a good right of action for all the installments due in point of time he has no right of action for any. *Beecher v. Conradt*, 3 Kernan (N. Y.) 108; *McCroskey v. Ladd*, 96 Cal. 455. The Illinois doctrine would seem to grant the vendor practically specific performance at law. Much the same result is reached, on the other doctrine, when the deed has been tendered. *Richards v. Edick*, 17 Barb. (N. Y.) 260, 264. Both results seem unfortunate. A better view would seem to be that where there has been a material breach, the vendor can sue only for such breach. Then, whether the deed has been tendered, or this is excused by the vendee's breach, the damages should be only the difference between the contract price and the market value of the land. See *Griswold v. Sabin*, 51 N. H. 167; *Hogan v. Kyle*, 7 Wash. 595.

CONTRACTS — RESCISSION — LOSS OF THE RIGHT BY NEGLIGENCE. — P signed an application for an insurance policy in the belief, induced by the fraud of the company's agent, that it called for a policy different from that for which it really called. P received the policy designated in the application and paid the first premium. Four months later, upon examining the policy for the first time, he discovered the fraud. *Held*, that because of unreasonable delay P cannot rescind the contract and the plaintiff, his assignee, cannot recover any part of the premium paid. *Bostwick v. Ins. Co.*, 92 N. W. Rep. 246 (Wis.).

The right to rescind because of fraud, being strictly an equitable right, is lost by acquiescence for an unreasonable length of time. *Cox v. Montgomery*, 36 Ill. 396; see *Norris v. Haggin*, 136 U. S. 386, 391; POLLOCK, CONT., 7th ed., 590-592. There can, however, be no acquiescence in the strict sense until there is knowledge of the fraud. Hence, ordinarily, mere delay without such knowledge does not preclude the right to rescind. *Pence v. Langdon*, 99 U. S. 578; *Lindsay, etc., Co. v. Hurd*, L. R. 5 P. C. 221, 241. But when in a business transaction like that of the principal case, the defrauded party has negligently failed to open his eyes to that which he should readily have discovered, sound policy would seem to require that mere ignorance of the fraud be regarded as



immaterial. See *Pence v. Langdon*, *supra*, 581. Obviously the case would not have fallen within this principle had fraud been exercised at the time of delivering the policy so as to throw the insured off his guard. This was so held in a recent case before the same court. *Bostwick v. Ins. Co.*, 92 N. W. Rep. 246. In short, it is a question of fact whether under all the circumstances the defrauded party was inexcusably negligent. Thus the principal case appears sound on principle; and such authorities as have been found are in accord. *Nat. Bank v. Taylor*, 5 S. Dak. 99, 111; see *McMaster v. Ins. Co.*, 87 Fed. Rep. 63.

**CORPORATIONS — RIGHT OF DIRECTORS TO PREFER THEMSELVES AS CREDITORS.** — The directors of a corporation were sureties on corporate debts. With the knowledge that the corporation was insolvent they transferred the entire corporate property to a trustee for payment of said debts. *Held*, that the conveyance will not be set aside as in fraud of creditors in a suit by one of them. *Nappanee Canning Co. v. Reid Murdock & Co.*, 64 N. E. Rep. 870, dissenting opinion 1115 (Ind., Sup. Ct.). For a discussion of the contrary decision of this case in the lower court, see 15 HARV. L. REV. 409.

**CRIMINAL LAW — NEGLIGENT MANSLAUGHTER — FAILURE TO GUARD RAILROAD CROSSING.** — Through the negligence of the defendant, a gate-keeper at a railroad crossing, in failing to close the gates a pedestrian was killed by a passing train. *Held*, that the defendant is guilty of manslaughter. *Rex v. Pitwood*, 19 T. L. R. 37 (Eng.). See NOTES, p. 297.

**DAMAGES — CONTRACT FOR THE SALE OF REALTY — WILFUL DEFAULT BY VENDOR.** — The vendor in a contract for the sale of realty refused to perform on the ground that she had made a poor bargain. *Held*, that the vendee, in an action for the breach, can recover only the purchase money actually paid, with interest. *Stuart v. Pennis*, 42 S. E. Rep. 667 (Va.).

Damages for the breach of a contract for the sale of realty, when this is due to the owner's non-culpable inability to convey clear title, are limited to the purchase money paid, with interest. *Flureau v. Thornhill*, 2 W. Bl. 1078; *Baldwin v. Munn*, 2 Wend. (N. Y.) 399. The rule, however, is restricted to cases of failure of title, where this limitation of damages may be sustained by reasons analogous to those for the defense of impossibility in an ordinary action on the contract. See SEDG. DAM., 8th ed., § 1006. But where the breach is wilful, there is no reason for reducing the damages, and full compensation is allowed. *Western R. R. v. Babcock*, 6 Met. (Mass.) 346; *Barbour v. Nichols*, 3 R. I. 187; *Allen v. Atkinson*, 21 Mich. 351. Nor is the principal case supported by the decisions of its own jurisdiction, for the authority cited as extending the rule in Virginia is, in so far as it is in point, confined to cases of failure of title, and two decisions tend to establish the proper rule of damages. *Wilson v. Spencer*, 11 Leigh (Va.) 261; *Newbrough v. Walker*, 8 Gratt. (Va.) 16.

**DAMAGES — STIPULATED DAMAGES — WHEN ENFORCED.** — The defendant contracted with the plaintiff to allow him the exclusive right of selling its pianos in St. Louis, and to pay him one hundred dollars for each and every breach of such agreement. *Held*, that, since the stipulated damages are not excessive and the actual damage cannot be measured with approximate certainty, the stipulated damages will be enforced. *Menges v. Milton Piano Co.*, 70 S. W. Rep. 250 (Mo. App.).

The expressed intention of the parties will in general govern in determining whether the stipulated sum is to be construed as a penalty, when it is unenforceable, or as liquidated damages. *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. Law 132, 140. The fact that the actual damage is incapable of approximate measurement has been a factor in determining the courts to give effect to the stipulated damages. *Streeper v. Williams*, 48 Pa. St. 450; *Wooster v. Kisch*, 26 Hun (N. Y.) 61. But in no case will the fundamental principle that what is sought is compensation only be violated. *Myer v. Hart*, 40 Mich. 517, 523; *Frank v. Block*, 9 N. Y. St. 101. The decision of the principal case therefore seems to be sound on principle and in accord with the authorities. *Streeper v. Williams*, *supra*; *Jones v. Binford*, 74 Me. 439. A similar but distinct class of cases is found where a party contracts in the alternative to do a certain act or to pay a certain sum at his option. In these cases a failure to do the act is construed as an election to pay the sum stipulated, and payment will be enforced. *Pearson v. Williams' Admrs.*, 24 Wend. (N. Y.) 244, affirmed 26 Wend. (N. Y.) 630; see *Penn. R. R. Co. v. Reichert*, 58 Md. 261.

**DAMAGES — TRANSPORTATION BY SEA — MEASURE OF DAMAGES FOR DELAY.** — Goods were shipped by steam vessel from New York to South Africa. Through the negligence of the shipowner the vessel was seized and detained. When finally re-



leased there was no market for the goods. *Held*, that the measure of damages to which the owner of the goods was entitled was the difference between the market value of the goods at the time when they ought to have been delivered and the market value at the time they were in fact delivered. *Dunn v. Bucknall Brothers*, 51 W. R. 102 (Eng., C. A.).

It is generally law that in a suit against a carrier for delay in delivery of freight anticipated profits cannot be recovered. *Hadley v. Baxendale*, 9 Ex. 341. It has, however, been held, both in England and in the United States, that damages for loss in market value through delay may be obtained from a carrier by land. *Collard v. S. E. R. R. Co.*, 7 H. & N. 79; *Cutting v. Grand Trunk R. R. Co.*, 13 Allen (Mass.) 381. The reason for allowing such damages is that the market value of the goods at the time when they should have been delivered is the value of which the consignee is deprived by the breach of contract. See SEDG. DAM., 8th ed., § 753. On the ground that the precise time of arrival of goods shipped by sea cannot be ascertained, the only two cases precisely in point that have been found, hold that damages for loss of market value cannot be obtained from a carrier by sea. *The Parana*, 2 P. D. 118; *The Nottingham Hill*, 9 P. D. 105. These cases have been cited as law. See CARVER, CARRIAGE BY SEA, 3rd ed., § 726. They have, however, been adversely criticised. See SEDGWICK, *supra*, § 855. Since at the present time sea carriage can be accomplished with as great a degree of certainty as land carriage, there would seem to be no reason why the same rule of damages should not be applied. The principal case is therefore to be commended for bringing about this desirable uniformity.

**EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO BUILD AND MAINTAIN RAILROAD STATION.** — The plaintiff conveyed land to the defendant in consideration of the latter's agreement to build and maintain a railroad station thereon. *Held*, that the court will give specific performance of the contract, although it is a contract to build, and involves the performance of continuous acts. *Murray v. Northwestern R. R. Co.*, 42 S. E. Rep. 617 (S. C.). See NOTES, p. 293.

**EVIDENCE — ADMISSIONS — STATEMENT BY CO-DEVISEE.** — Several devisees under the same will offered it for probate. To prove the incompetency of the testator an admission by one of the co-devisees was offered. *Held*, that this evidence is admissible. *Gibson v. Sutton*, 70 S. W. Rep. 188 (Ky.).

An admission of the testator's incapacity by a sole devisee or legatee is unquestionably admissible. See *In re Baird*, 47 Hun (N. Y.) 77, 78; *McMillan v. McDill*, 110 Ill. 47, 50. Where, as in the principal case, other devisees are parties to the record such evidence would have almost as great, if not equal, probative force. But according to the great weight of authority, it is excluded. *In re Baird, supra*; *Hauberger v. Root*, 6 W. & S. (Pa.) 431. These cases apply the general principle that mere community of interest is insufficient to render the admission of one party competent as evidence against another, even though a party to the same record. See *In re Baird, supra*; 1 GREENL. EV., 16th ed., § 176. Where, on the other hand, there is an identity of interest between the parties such as that of partnership, such evidence is clearly admissible. *Cady v. Shepherd*, 11 Pick. (Mass.) 400, 407. The few authorities supporting the principal case are comparatively early cases. *Brown v. Moore*, 6 Serg. (Tenn.) 272; *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399. The Kentucky decision just cited went partly on the ground that at that time no party to the record could be called as a witness. This rule no longer prevails. See *Milton v. Hunter*, 13 Bush (Ky.) 163, 168. Since, therefore, the co-devisee may now be called upon to testify directly, the court would, it seems, have been justified in departing from a rule which, as they apparently recognized, is opposed to both principle and authority.

**EVIDENCE — AFFIDAVIT OF JURORS AS TO PROCEEDINGS IN THE JURY ROOM — ATTACK ON VERDICT.** — On an appeal, the plaintiff in error offered in evidence affidavits of a juror, that the foreman had made, in the jury room, from his own knowledge, statements not given before the court, and bearing on a material issue. *Held*, that the affidavits are not admissible. *St. Louis, etc., Ry. Co. v. Ricketts*, 70 S. W. Rep. 315 (Tex., Civ. App.).

It is a well recognized doctrine, that, in order to insure perfect freedom of discussion, testimony in regard to proceedings in the jury room should generally be excluded. *Woodward v. Leavitt*, 107 Mass. 453. But to exclude evidence of improper conduct such as in the principal case seems to go beyond the reason of the rule, though one case exactly in accord has been found. *Price v. Warren*, 1 Hen. & M. (Va.) 385; *contra*, *State v. Burton*, 70 Pac. Rep. 640 (Kan.). Many courts have protected even greater improprieties. See *Clum v. Smith*, 5 Hill (N. Y.) 560; *Boetge v. Landa*, 22 Tex. 105.

Such extensions, however, seem opposed to principles of justice, which would demand rather that the rule be closely restricted. There is another rule excluding evidence of the mental state of a juror, such as misunderstanding of instructions, improper motives, etc., as too difficult to disprove. *Mattox v. United States*, 146 U. S. 140. Some cases seem to treat this as the only rule of exclusion, and so confusion is caused, but they plainly do not involve the question in the principal case.

**EVIDENCE — SELF-INCRIMINATION — EXAMINATION BY ORDER OF COURT.** — A prisoner charged with rape was examined by physicians against his consent. *Held*, that the testimony of the physicians who made the examination was wrongfully admitted by the trial court. *State v. Height*, 91 N. W. Rep. 935 (Ia.). See NOTES, p. 300.

**FRAUDULENT CONVEYANCES — CONSIDERATION — DISCONTINUANCE OF DIVORCE PROCEEDINGS.** — A husband, while insolvent, conveyed property to his wife, in consideration of her discontinuing divorce proceedings then pending. *Held*, that the conveyance could be set aside by creditors of the husband, for want of sufficient consideration. *Oppenheimer v. Collins*, 91 N. W. Rep. 690 (Wis.).

A discontinuance of divorce proceedings is good consideration for a contract. *Phillips v. Meyers*, 82 Ill. 67. Inadequacy of consideration is immaterial, even where third parties are interested, except as evidence of fraud. *Bayspoole v. Collins*, L. R. 6 Ch. 228. Whether such a conveyance as that in the principal case should be set aside, without requiring further proof of fraud, must therefore be a question of policy alone. The point seems to be new. The court argues, that transactions of this sort if sustained would offer too great an opportunity for defrauding creditors, by the institution and discontinuance of collusive divorce proceedings. On the other hand, the rule of the court would often impose an unjust hardship upon the wife, and moreover the law favors agreements for a continuance of the marital relation. See *Adams v. Adams*, 91 N. Y. 381. The difficulty suggested by the court might be met perhaps with more justice to all concerned, if the circumstances were regarded as merely raising a presumption of fraud, requiring evidence of good faith from the wife.

**JUDGMENTS — MERGER BY SECOND JUDGMENT — LOSS OF PRIORITIES.** — X obtained a judgment constituting a lien on the judgment debtor's property; Z shortly thereafter also recovered judgment. Seven years later X brought an action on his judgment, and obtained a new judgment. *Held*, that the first judgment obtained by X is not merged in the second so as to destroy the priority of the first. *Springs v. Pharr*, 42 S. E. Rep. 590 (N. C.).

The decision in the principal case is in accord with previous North Carolina decisions. *Carter v. Coleman*, 34 N. C. 274; *McLean v. McLean*, 90 N. C. 530. It is rested on the old theory of merger by judgment, that a security of a higher nature extinguishes inferior securities, but not securities of equal degree. *Cf. Andrews v. Smith*, 9 Wend. 53. That theory explains the rule that a judgment obtained in a court of a foreign nation is not a merger of the original cause of action in the home forum; but it does not explain the rule that a judgment recovered in one of the United States merges the original cause of action in all the others. *Cf. Bank of Australasia v. Nias*, 16 Q. B. 717; *New York, etc., R. R. Co. v. McHenry*, 107 Fed. Rep. 414; *Harrington v. Harrington*, 154 Mass. 517. The true theory is that it is a policy of law to discourage superfluous and vexatious suits by causing a prior judgment to be merged in a second and rights under the former lost. See FREEMAN, JUDGM., 4th ed., § 215. Thus a foreign judgment is not merged, because the suit is not vexatious but for additional relief; but a judgment in one of the United States is merged in a judgment in another, because the second is vexatious and superfluous owing to Art. IV. sec. 1. of the Constitution. On the theory submitted the decision in the principal case is objectionable, unless the suit was a formal one to revive or renew the old judgment, in which case it ought to have been commenced by a *scire facias*. See BLACK, JUDGM., § 482 a.

**MUNICIPAL CORPORATIONS — RIGHT TO EXCLUSIVE USE OF NAME.** — A railroad company established a new station, giving it the name already borne by a town situated near by upon the same railroad. The resulting confusion caused inconvenience to passengers and to shippers. The town filed a bill to restrain the railroad company from applying this name to the new station. *Held*, that the bill is not maintainable. *Gulf & Ship Island R. R. Co. v. Town of Seminary*, 32 So. Rep. 953 (Miss.).

The law does not, as a general principle, recognize exclusive rights in a name, except in cases of trademark. See *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; *New York, etc., Co. v. Copley Cement Co.*, 45 Fed. Rep. 212. Equity will, however, restrain the use of another's name in business competition in such a way as to mislead the public. *Croft v. Day*, 7 Beav. 84; *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893. Such

injunctions involve recognition of an equitable right to carry on business unhindered by unfair competition, and seem to be merely an exercise of the broad discretionary power of equity to protect substantial interests from damage caused by sharp practice. *Cf. Kempson v. Kempson*, 58 N. J. Eq. 94. This doctrine obviously fails to cover the principal case, since there the injunction is not sought to protect any substantial interest of the municipal corporation as such. Nor can the corporation constitute itself guardian of the general business interests of the inhabitants. See *Dover v. Portsmouth Bridge*, 17 N. H. 200, 215. While, therefore, the result of the principal case may be regretted, it seems impossible to dispute the correctness of the decision. If any remedy exists, it would seem to be mandamus against the railroad company or possibly injunction at the suit of an individual who is sustaining inconvenience.

**PERSONS — MORTGAGE BY INFANT — AVOIDANCE.** — The plaintiff, while an infant, obtained advances from a building society, to purchase a piece of land and to erect houses thereon. The land was conveyed to the infant by the vendor and the next day mortgaged to the society to secure the advances. On learning of the plaintiff's infancy the society took possession of the property. When the plaintiff attained her majority, she repudiated the contract and mortgage, and brought action for possession. *Held*, that the mortgage is void; yet, since but for the advance of the purchase money the vendor would have had a vendor's lien, the society can to the extent of the purchase money stand in the vendor's shoes. *Nottingham, etc., Society v. Thurstan*, 19 T. L. R. 54 (H. of L., Eng.).

This decision is a direct affirmance of the decision of the Court of Appeal in the same case which had reversed the decision of the Chancery Division. For a discussion of the principles involved in those decisions, see 14 HARV. L. REV. 388; 15 HARV. L. REV. 494. To those discussions should be added *Ready v. Pinkham*, 63 N. E. Rep. 887. In that case the Supreme Judicial Court of Massachusetts without reference to the English decisions reached, on similar facts, an opinion in accord with that of the Chancery Division in *Thurstan v. Nottingham, etc., Society*, [1901] 1 Ch. 88.

**PROPERTY — CONTINGENT OR VESTED REMAINDER.** — The testator devises land to A for life, remainder to any child or children surviving him, but if A dies leaving no child surviving him, then to his brothers and sisters. *Held*, that the brother has a vested remainder subject to be divested by the birth of a child. *Boatman v. Boatman*, 65 N. E. Rep. 81 (Ill., Sup. Ct.).

A remainder is usually considered vested if it is subject to no condition precedent save the termination of the preceding estate. Vested estates are favored by the law, and conditions are construed as subsequent if possible. This policy seems to have led to the above decision. But in the principal case the contingency must obviously happen, if at all, before the estates in remainder come into possession and therefore is precedent in fact. The law, however, looks less to the operation of the condition than to the language employed in the gift. See GRAY, PERP., § 108. Thus, if after an absolute estate is given, a divesting clause is added, the estate is considered vested. *Andrew v. Andrew*, 1 Ch. D. 410. But if the condition is incorporated into the description of the estate in remainder, it is regarded as contingent. *Price v. Hall*, L. R. 5 Eq. 399. The question is largely one of construction, but it would seem that the remainder in the principal case should, under these rules, be regarded as contingent. *Doe d. Planner v. Scudamore*, 2 B. & P. 289. See GRAY, PERP., §§ 101-108.

**PROPERTY — DEEDS — DELIVERY IN ESCROW TO THE GRANTEE.** — The plaintiff executed a deed of land to her husband and placed it in his possession with the understanding that it was to be recorded only in case he survived her. The husband died in the plaintiff's lifetime, having previously recorded the deed. An action to quiet title was brought. *Held*, that the deed was never delivered so as to pass title to the husband. *Kenney v. Parks*, 70 Pac. Rep. (Cal.) 556.

A deed may be delivered in escrow to a third party. *Raymond v. Smith*, 5 Conn. 555. But if the delivery is to the grantee, it has long been the rule that an escrow cannot be created and that the deed becomes operative at once. SHEPPARD'S TOUCH. 59; *Darling v. Butler*, 45 Fed. Rep. 332. The origin of this distinction appears to have been the importance attached to sealed instruments, lawfully in the possession of a grantee or obligee. COKE'S LIT., 36 a. Although a seal is no longer so important, the objection remains to controverting the natural inference from the grantee's rightful possession of an instrument of title. The decision, however, is supported by the analogy of the rule permitting conditional delivery to the grantee if not strictly in escrow. *Brackett v. Barney*, 28 N. Y. 333. Also simple contracts, though not bonds, may be delivered in escrow to the obligee. *Pym v. Campbell*, 6 E. & B. 370; *Moss v. Riddle*, 5 Cranch (U. S. Sup.

Ct.) 351. But the prevailing view, by restricting the grantor to equitable relief, protects an innocent third party dealing with the grantee, and hence would seem preferable to the rule of the principal case which extends the dangerous doctrine of escrow, so harsh to third parties. See *Smith v. South Royalton Bank*, 32 Vt. 341.

PROPERTY — GIFT CAUSA MORTIS — PAROL CHOSE IN ACTION. — A creditor, seriously ill and in expectation of death, orally directed the defendant, his debtor, to pay the plaintiff's deceased the debt, which was not evidenced by note or other writing. The debtor assented, and, shortly after, the original creditor died. *Held*, that the plaintiff is entitled to recover the amount of the debt. *Castle v. Persons*, 117 Fed. Rep. 835 (C. C. A., Eighth Circ.).

The court differed here both as to result and reasoning. Of the majority, one judge thought there was a valid gift *causa mortis*; the other, a good novation. The first ground seems erroneous. Where a chose in action is not in the form of a specialty, a gift of it seems never to have been held to operate as more than a revocable power of attorney. If so, it should be revoked by the death of the donor. *Sewell v. Moxey*, 2 Sim. N. S. 189; *contra*, *Airey v. Hall*, 3 Sm. & G. 315. The decision must be supported, then, if at all, on the second ground. It must appear that the plaintiff sued as sole beneficiary on a new contract between the debtor and original creditor, which would amount to a substitution of creditors, a sort of novation resulting from the sole beneficiary doctrine. Whether these were the facts may well be doubted. Courts have reached a like result on the erroneous reasoning that the debtor became a trustee for the intended beneficiary. *McFadden v. Jenkins*, 1 Ph. 153; *Eaton v. Cook*, 25 N. J. Eq. 55.

PROPERTY — LEGACIES — SET-OFF OF DEBT BARRED BY STATUTE OF LIMITATIONS. — In a hearing in the Probate Court on the distribution of an estate it appeared that a legatee owed the testator a debt barred by the Statute of Limitations. *Held*, that the amount of the debt should be deducted from the bequest made to the legatee. *Holden v. Spier*, 70 Pac. Rep. 348 (Kan.). A contrary decision on similar facts is reported in *Wilson v. Smith*, 117 Fed. Rep. 707 (Circ. Ct. E. D. Pa.). For a discussion of the principles involved, see 14 HARV. L. REV. 73.

PROPERTY — PERCOLATING WATERS — LIMITATIONS UPON RIGHT TO APPROPRIATE. — The defendant dug artesian wells on his land and piped percolating water off to sell for irrigation purposes, to the damage of adjoining landowners. *Held*, that a landowner must be limited to the reasonable use of such water in connection with the use of his own land. *Katz v. Walkinshaw*, 70 Pac. Rep. 663 (Cal.). See NOTES, p. 295.

PROPERTY — PERPETUITIES — RULE AGAINST A POSSIBILITY ON A POSSIBILITY. — By a marriage settlement, and by an appointment under it, a gift of personalty was made to unborn children for life, with limitations over to their unborn children. Suit was brought to determine whether the limitations over were bad for remoteness. *Held*, that they are valid, since the old rule against a possibility on a possibility has no application to personal estate. *In re Bowles*, [1902] 2 Ch. 650. See NOTES, p. 294.

PROPERTY — RIGHT OF GENERAL PECUNIARY LEGATEE TO MARSHAL AS AGAINST SPECIFIC DEVISEE. — A testator first directed that all his debts be paid, and then left two pecuniary legacies to A and B, and his farm to X. The general personal estate was insufficient to pay the debts and legacies. *Held*, that A and B may marshal the assets so as to stand in the place of the creditors against the realty, so far as the debts were paid out of the personalty. *In re Roberts*, [1902] 2 Ch. 834.

The case is in line with the general trend of English decisions. *In re Stokes*, 67 L. T. N. S. 223. See *contra*, *In re Bate*, L. R. 43 Ch. D. 600. The equitable doctrine of marshaling can be applied in favor of the legatees only on the assumption that the creditors have two funds which they can indifferently subject to their claims. It is true that they have. *Quarles v. Capell*, 2 Dyer 204 b. But it is equally true that an executor in settling debts must exhaust the personalty before applying the realty charged with their payment. *Samwell v. Wake*, 1 Bro. C. C. 132. It seems, therefore, at least an anomalous application of the doctrine of marshaling to prefer the general legatee at the expense of the specific devisee, whom it is ordinarily presumed to be the intention of the testator to favor. The decision, then, might better have been put on the ground that the general direction to pay debts is sufficient to express the testator's intention to charge the legacies on the realty. See *Aldrich v. Cooper*, 8 Ves. 381, 396. This seems to be assumed in England. But in America a much stronger expression of intention is required. See WOERNER, AM. ADM., 2nd ed., \*1095, and cases cited.



**SALES — BILLS OF LADING — LIABILITY OF ASSIGNEE FOR VENDOR'S BREACH OF CONTRACT.** — The defendant purchased from the vendors of corn a draft drawn on the plaintiff, the vendee. A bill of lading of the corn was attached to the draft. The vendee paid the draft and later sued the defendant for a breach of warranty on the contract of sale. *Held*, that the defendant is liable. *Russel v. Smith Grain Co.*, 32 So. Rep. 287 (Miss.). See NOTES, p. 292.

**TORTS — EXTRA-HAZARDOUS EMPLOYMENT — LIABILITY FOR INJURIES BY CONCUSSION FROM BLASTING IN CITY STREETS.** — The defendant was a contractor excavating in the streets of the city of Chicago under contract with the city. The plaintiff's building was materially damaged by the concussions from the blasts. *Held*, that the defendant is liable regardless of negligence. *Fitzsimons & Connell Co. v. Braun*, 65 N. E. Rep. 249 (Ill., Sup. Ct.).

In certain classes of cases the law imposes liability independent of negligence because of the extra-hazardous nature of the defendant's occupation. *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio, 560. The principal case, however, it is submitted, should not be included within this category. The doctrine of *Fletcher v. Rylands* does not apply here since the defendant was acting neither solely for his own benefit nor upon his own land. Nor have others been held absolutely liable for the injuries caused by similarly dangerous agencies properly brought into city streets. *Strawbridge v. City of Philadelphia*, 13 Phila. (Pa.) 173; see *Denver Electric Co. v. Simpson*, 21 Col. 371, 372. There seems to be no reason on principle or grounds of public policy for making an exception in the case of necessary blasting under these conditions. Moreover in this case there was no technical trespass. *Cf. Hay v. Cohoes Co.*, 2 N. Y. 159; *French v. Vix* 2 N. Y. Misc. 312; *Booth v. Rome, etc., R. R. Co.*, 140 N. Y. 267. Yet there is authority in accord with the principal case. *Colton v. Onderdonk*, 69 Cal. 155. The result seems unfortunate, for it tends to impose an absolute liability where at most the injury should be only *prima facie* evidence of negligence. *Ulrich v. McCabe*, 1 Hilt. (N. Y.) 251. Of course the degree of care required will be commensurate with the risk involved. See *Larson v. Central Ry. Co.*, 56 Ill. App. 263.

**TORTS — LIABILITY FOR SPREADING OF FIRE.** — The defendant set fire to brush in order to clear his land. It spread to land of the plaintiff. *Held*, that the defendant maintained the fire at his own risk, and, on the principle of *Fletcher v. Rylands*, is absolutely responsible for damage caused by it. *Crewe v. Mottershaw*, 38 Can. L. J. 736 (Sup. Ct., British Columbia).

By ancient English law a defendant was liable, irrespective of negligence, for damage done by fire spreading from his property; see *ROLLE*, ABR. Action sur Case, B. 1; *Tubervil v. Stamp*, 1 Salk. 13. This was changed by a line of statutes, beginning with 6 Anne, c. 31, and to-day the common law generally allows no recovery unless negligence is shown; *Vaughan v. Taff Vale R. R. Co.*, 5 H. & N. 679; *Dean v. McCarty*, 2 U. C. Q. B. 448; *Stuart v. Hawley*, 22 Barb. (N. Y.) 619; *contra, Fordyce v. Kearns*, 2 R. L. 623 (Quebec). Whenever economic necessity has demanded it, the rule of *Fletcher v. Rylands* has yielded. *Madras, etc., Co. v. Zemindar, etc.*, L. R. 1 Ind. App. 364. So, too, in the "steam-boiler cases." *Marshall v. Welwood*, 38 N. J. Law 339. In a new country fire is a natural and often necessary means for clearing land. It may be argued that negligence would be hard to prove and its effects in such cases peculiarly disastrous. This might justify placing the burden of disproving it on the defendant, but not making him absolutely liable. So the decision in the principal case seems unsound on both authority and principle.

**TORTS — NON-NEGLIGENT MISTAKE AS A DEFENSE.** — The defendant, a police officer, shot and killed the plaintiff's husband, in the reasonable belief that he had committed a felony, after using all other available means to arrest him. He had in fact committed no felony. *Held*, that in an action to recover for his death the non-negligent mistake of the defendant is no defense. *Petrie v. Cartwright*, 70 S. W. Rep. 297 (Ky.).

This decision raises the large question of recovery against a non-culpable defendant; see 15 HARV. L. REV. 335. Recovery in tort is based generally on culpability, but there is a large class of exceptions, *e. g.*, trespass to land. As regards trespass to the person, the law seems unsettled. Where an officer arrests a person erroneously named in the process, his mistake does not excuse him. *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 126. But where he supposes one to be subject to arrest who has a privilege, he is excused. *Tarlton v. Fisher*, 2 Doug. 671. The cases are difficult to distinguish. The true rule would seem to be one of policy. When the defendant's acts are of a sort not to be encouraged, his mistake should not excuse him. The act in the principal case is of this nature, so that the decision seems sound.

**TORTS — PROCURING BREACH OF CONTRACT — JUSTIFICATION.** — A labor union by threatening a strike forced a business firm to break its contract with an apprentice, and when sued by the latter justified its action on the ground of its prior contract with the firm forbidding such employment. *Held*, that the prior contract does not constitute justification. *Read v. Friendly Society, etc.*, 19 T. L. R. 20 (Eng., C. A.). See NOTES, p. 299.

**TORTS — SEDUCTION — RECOVERY BY MOTHER AFTER DEATH OF FATHER.** — A daughter was seduced and rendered pregnant during her father's lifetime. The father died two months before her confinement and her mother instituted the action. *Held*, that the mother may not recover, because the daughter was not her servant at the time of seduction. *Hamilton v. Long*, 36 Irish L. T. R. 189. See NOTES, p. 298.

**WILLS — BEQUEST PROCURED BY MISREPRESENTATION OF PERSON OTHER THAN THE LEGATEE.** — The testator's son had communicated to his father that he was married to one L. with whom the testator never was acquainted. In fact, L. was the son's mistress. Thereafter the testator bequeathed certain property to his son's wife, L. *Held*, that the legacy does not fail. *Anderson v. Berkley*, [1902] 1 Ch. 936.

In accord with previous English authority, the court found that the son's mistress was the person designated by the testator. But on the point that an innocent legatee, personally unknown to the testator, should not be deprived of her bequest because of misrepresentations to the testator by another, this seems to be the first decision. Where the beneficiary was personally known to the testator, the legacy was allowed, on the ground that it may have been given owing partly to personal affection rather than to the misrepresentation. *Wilkinson v. Joughin*, L. R. 2 Eq. 319. This reason however fails in the principal case. Moreover, a gift *inter vivos* under these circumstances has been declared voidable. *Harris v. Delamar*, 3 Ired. Eq. (N. C.) 219. Fraud of the legatee will avoid the bequest. *Kennell v. Abbott*, 4 Ves. 802. Likewise undue influence by anyone. *In re Cahill*, 74 Cal 52. These analogous cases leave the decision in the principal case open to question. A reason for the decision is that an innocent legatee is otherwise deprived of the testator's bounty. But the bequest in the principal case may well be considered as the probable and contemplated result of the deception. *Cf. Melenish v. Milton*, 3 Ch. D. 27, 34-35. Further, although the testator cannot control the alternative distribution of his property, this should have no greater influence than in cases of lapsed and void bequests and legacies.

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## BOOKS AND PERIODICALS.

**CONSTITUTIONALITY OF SHIP SUBSIDIES AND SUGAR BOUNTIES.** — The power of Congress to grant bounties to ship owners or sugar manufacturers is denied by a recent writer in the Columbia Law Review. *Ship Subsidies and Sugar Bounty Statutes: Their Constitutionality*, by Herman Foster Robinson, 2 Colum. L. Rev. 525 (Dec., 1902). The author argues that the power to appropriate money raised by taxation is only co-extensive with the power to tax. He maintains that Congress can tax only for a public purpose, and that payments for bounties are not for a public purpose. If bounty acts are unconstitutional, he believes that payments made under them could be recovered, and that Congress would have no power to reimburse those who might be damaged by relying upon them.

It is a part of the definition of a tax that it shall be for a public purpose. Accordingly, levies authorized by state legislatures for private purposes have always been held void. *Curtis's Admr. v. Whipple*, 24 Wis. 350. Further, state acts authorizing public bond issues in aid of private enterprises are held unconstitutional on the ground that the power to contract is limited by the power to tax. *Loan Assn. v. Topeka*, 20 Wall. (U. S. Sup. Ct.) 655. Appropriation of money in the treasury for private purposes by a state would be equally unconstitutional, since the money has been raised by taxation and must be replaced by the same means. If a state legislature, which has all legislative power not forbidden to it by the state constitution, is thus restricted as to the objects of its appropriations, it follows that Congress, which has only the more



limited powers conferred by the Constitution, cannot, under the general taxing power with which it is intrusted, appropriate money for other than public purposes.

What is a public purpose is primarily for the legislature to determine, and the courts will not interfere unless the decision of the legislature is wrong beyond a reasonable doubt. *Speer v. School Directors, etc.*, 50 Pa. St. 150. On the other hand, it is clear that the benefit to the public must be direct, not merely incidental. Accordingly, the promotion of manufactures is not a public purpose. *Loan Assn. v. Topeka, supra*. Tested by this rule, a sugar bounty would not seem to be for a public purpose; and it has been pronounced in a *dictum* to be unconstitutional on that account. *Miles Planting Co. v. Carlisle*, 5 App. D. C. 138. In Michigan, a state sugar bounty has been held void. *Michigan Sugar Co. v. Auditor-General*, 124 Mich. 674.

The validity of a ship subsidy, however, involves different considerations. It is well settled law that taxation for a railroad connecting a community with some other region is for a public purpose, though the road be outside the community to be taxed, and even outside the state. *Railroad Co. v. County of Otoe*, 16 Wall. (U. S. Sup. Ct.) 667. The analogy between such a railroad and foreign-going shipping seems close, especially in view of the fact that the lines of vessels connecting this country with others are, like railroads, common carriers. *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397. Furthermore, in time of war a merchant marine is indispensable as an auxiliary to the navy. On the whole, there may well be room for an honest doubt as to whether the building up of a merchant marine is not a public purpose, and such doubt, if it exists, must be resolved in favor of the act of Congress.

If it be granted that appropriations are unconstitutional, the author's conclusion that the United States may recover back any sums paid out under them seems to follow. The government is bound by the acts of its officers only when they are acting within their rightful authority. Consequently it is held that money paid out by them under a misconstruction of law is recoverable. *United States v. Saunders*, 79 Fed. Rep. 407. See also *Wisconsin Central R. R. Co. v. United States*, 164 U. S. 190. The same rule should apply to payments made under an unconstitutional law.

The position of the author that Congress cannot reimburse those who may sustain loss by relying on an unconstitutional law is consciously taken in the face of the direct decision of the Supreme Court to the contrary. *United States v. Realty Co.*, 163 U. S. 427. The court there held that irrespective of the constitutionality of the law those who had acted in reliance upon it had such a moral or honorary claim that Congress might lawfully appropriate money for them. The arguments against the view taken by the court were fully presented by counsel, and it seems extremely unlikely that the court will overrule its decision.

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DOES AN AGENT IMPLIEDLY WARRANT HIS AUTHORITY? — The recent case of *Oliver v. The Bank of England*, [1902] 1 Ch. 610, has called forth an article in *The Law Quarterly Review* in which the authority of that case is discussed under the title *Some Recent Developments of the Doctrine of Collen v. Wright*, by Francis R. Y. Radcliffe, 18 L. Quart. Rev. 364 (Oct., 1902). *Collen v. Wright*, it will be remembered, is the English case in which it was first authoritatively laid down that an agent innocently acting without authority and inducing the plaintiff to enter into a contract for an existing principal, impliedly warrants his agency. *Collen v. Wright*, 8 E. & B. 647. Since the court there professed to find consideration for the warranty in the plaintiff's consent to make the contract, the writer in *The Law Quarterly Review* contends that the doctrine cannot properly be extended to cases in which the professing agent induces an act other than entering into a contract, and that *Oliver v. The Bank of England* is consequently wrong. In that case a broker, thinking himself an agent under a power of attorney which proved to be a forgery, demanded that the Bank of England allow him to transfer some consols; and this the Bank did,

to its loss. The court allowed a recovery against the broker. The article contends that since, if the power had been good, the Bank would have been already bound by law to transfer the consols, there could be no consideration. But is this conclusion justified? When the power came before the agent and the Bank, neither of them knew whether it was good or not, and from their point of view it might turn out either way. Would not a warranty be supported therefore by ample consideration, the detriment incurred by the Bank being the risk that the result of the transfer might be contrary to its interests? Contracts on such consideration are sustained. *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Seward v. Mitchell*, 1 Cold. (Tenn.) 87. Of course the reply is obvious that the parties never intend to make any such contract. But neither did they so intend in *Collen v. Wright*. To say that they did is a fiction, and has been so called. See dissenting opinion of Cockburn, C. J., *Collen v. Wright*, *supra*; HUFFCUT, AGENCY, 231. If it is a fiction, there is no reason why a court may not apply it as bravely to the one case as to the other, to *Oliver v. The Bank of England* as bravely as to *Collen v. Wright*.

Obviously the fiction of warranty confuses the matter. It is desirable to ascertain clearly the real basis on which these cases must rest. Since the case of *Peek v. Derry* in the House of Lords the only ground on which they can be put is that of business convenience and necessity. That case decided that one who suffers by acting in reliance on a merely negligent misrepresentation cannot recover. *Peek v. Derry*, L. R. 14 App. Cas. 337. *A fortiori* he could not recover on a non-negligent misrepresentation. We therefore have to recognize that in England the *Collen v. Wright* cases are an exception to *Peek v. Derry*, in that they allow a recovery where an agent makes a misrepresentation as to his authority. The ground of business necessity suggested as a basis for the exception is a very strong one. Business has to be conducted through agents. The agent usually can investigate his authority and find out with considerable certainty whether or not it exists in a particular case, while the person with whom he deals very seldom can. As a consequence it is, as a matter of fact, the custom of business men to take agents largely upon trust. There are peculiar reasons therefore why an agent should be viewed differently from others and held liable for even an innocent and non-negligent misrepresentation as to a fact which it is especially within his province to know, and which others as a practical matter are unable to investigate. It is both just and necessary for the safe conduct of business. These arguments would seem ample to justify an exception with regard to these cases. The exception being granted, it of course includes *Oliver v. The Bank of England*. That case appears to be rightly decided.

It is interesting to note that where the agent acquaints the person with whom he deals of the doubt as to his authority he is not held liable. *Lilly v. Smales*, [1892] 1 Q. B. 456.

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UNRECORDED TRANSFER OF STOCK. — A recent article discusses the respective rights of the creditor who has attached the stock of his debtor upon the books of the corporation and the prior purchaser who has failed to obtain a transfer upon the books. *Certificates of Stock: Relative Rights of an Attachment Creditor and a Prior Unrecorded Transferee*, by L. L. Leonard, 55 Central L. J. 243 (Sept. 26, 1902). The author considers the creditor entitled to preference on strict legal principle, but admits that the practical demands of business will ultimately cause the transferee to be given priority. Mr. Leonard's argument seems somewhat weakened by the fact that his cases are often inaccurately cited; in several instances also they do not turn on the point for which he cites them.

It seems conceded that apart from the usual regulation by statute or by the charter or the by-laws of the corporation the legal title to stock passes to the transferee by the act of sale and the creditor of the transferor can thereafter have no claim upon it. *Boston, etc., Association v. Cory*, 129 Mass. 435; LOWELL, TRANSFER OF STOCK, § 80. Statutory or charter provisions are generally found, however, which provide that stock shall be transferable only on the

books of the corporation. As to the effect of these provisions, the decisions are in conflict. One view is that they apply only to the relations between the corporation and the stockholders. Under this construction they cannot affect the question under discussion, and consequently the transferee prevails. See *Mount Holly, etc., Co. v. Ferree*, 17 N. J. Eq. 117. A second construction adopted by some courts gives them an effect similar to that of recording acts. This leaves out of account the consideration that the books are not open to public inspection and that hence there can be no analogy between registering a deed and recording a transfer of stock upon the books. See *Noyes v. Spaulding*, 27 Vt. 420. Most jurisdictions hold a third view, namely, that the legal title remains in the vendor, and that the vendee has only an equitable interest which may be extinguished by a sale to an innocent purchaser. *Otis v. Gardner*, 105 Ill. 436. In these jurisdictions the rights of the creditor and the transferee are often made to depend upon whether an attachment creditor is treated as a purchaser for value or as a volunteer. It would seem, however, that the general custom of business should be the determining factor. In the case of stock the *indicia* of ownership are in the person who has the certificate, not in the person in whose name the stock is registered. Banks advance money and buyers pay the price upon delivery of the certificates without registration. To require that the transfer should be registered before the vendee can have a secure title would unsettle the titles to a large part of existing stock. It cannot be too strongly urged that courts should recognize conditions as they exist in the business world, and apply legal principles that are in harmony with them, rather than build up from analogy theories which do not take into account the customs and needs of business men. It is gratifying to note that the courts in the more important commercial states favor the transferee, and that in many states where the courts have committed themselves to an opinion preferring the creditor, the transferee is now protected by statute. *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 494; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Smith v. American Coal Co.*, 7 Lans. (N. Y.) 317; *Finney's Appeal*, 59 Pa. St. 398; Mass. R. L. (1902), c. 109, § 37.

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THE ADMINISTRATION OF DEPENDENCIES: A Study of the Evolution of the Federal Empire, with Special Reference to American Colonial Problems. By Alpheus H. Snow. New York and London: G. P. Putnam's Sons, The Knickerbocker Press. 1902. pp. vi, 619. 8vo.

The American colonial problem has now passed beyond its violently controversial stage. For good or ill this republic has undertaken the government of distant dependent peoples. The question is no longer as to the wisdom of the adoption of such a course or of the possibility of escape from it; for the burden has already been assumed. The problem now before us therefore involves primarily a search for the true principles of colonial government, and a consideration of methods and means for their proper application. Its solution will not merely require infinite patience and fortitude in practical affairs, but will perhaps even more urgently demand a thorough and vigorous understanding of the nature of our now American Empire and of the relations of its constituent States one with another, with their correlative rights and duties. Without this, ultimate success can hardly be attained. To the study of this all-important problem the present work is a timely and notable contribution.

The chief aim of the book is to establish the proposition that the American Union and the peoples and lands of its dependencies constitute a Federal Empire in which the American Union, itself a Federal State, governed in its own affairs under a written constitution, is the Imperial or Parent State, standing in a federal or contractual relation with the dependent or colonial states of the Empire and ruling them under an unwritten constitution, which in the affairs of the Empire is above the constitution and laws of the Imperial State though in the main derived from them. On this theory, the dependencies are regarded as actual states over which the Imperial State has neither unconditional nor

unlimited power, but only a power of disposition, that is, a power of superintendence and of adjudication upon the interests of the whole Empire according to its unwritten constitution. This power is accompanied by the power to execute such adjudications by all needful rules and regulations. This principle of Federal Empire the author believes to have been adopted by that little understood article of the Constitution which gives Congress power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

The proof of this position requires, and receives at the hand of the author, a most thorough investigation of the origin and history of this clause and of the principle which it is said to establish. This in turn involves a careful inquiry into the theory and practice of the administration of the American Colonies by England from their inception, and leads to a thorough study of the issues of the American Revolution and of the underlying principles then at stake. In this study the gradual growth of the idea of Federal Empire is traced with much detail as it slowly takes form and finally culminates in the adoption of this clause of the constitution and its subsequent interpretation by the First Congress in its ordinance for the administration of the Northwest Territory as a dependency of a Federal Empire.

The development of the idea is then followed down to the present time in American, British, and Continental theory and practice. The history of the idea in this country is especially noteworthy as its growth is traced through the various expressions of legislative and judicial opinion to the final recognition, as the author believes, of the purposes of the framers of the constitution by the majority of the United States Supreme Court in the recent Insular Tariff Cases. Thus, aside from its main object of suggesting a solution of the colonial problem, this book becomes a most valuable study of the evolution of the Federal Empire as a predominating form of political organism.

As a work on theoretical government or constitutional law, this discussion can perhaps hardly be said to be a finality. It is rather a preliminary study which will perform a vital service in clarifying thought and indicating general principles. Many of its conclusions may be open to criticism, some perhaps are unsound; but from the earnest, practical lessons that are drawn for our guidance in colonial administration there can be no dissent. For the Federal principle, as here declared, is shown to give rise to a trust relation between the Imperial State and its dependencies, which imposes certain definite Imperial obligations upon the governing state, these being fully and forcibly set forth in the final chapter. The book surely points in the right direction and with its enthusiastic scholarship will inspire further effort in the development of what seems to be the true theory of our government. It can emphatically be said to deserve a prominent place among the thoughtful works of the year as one whose influence ought to prove permanent and especially stimulating.

W. H. H.

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A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS. By Walter Chadwick Noyes. Judge of the Court of Common Pleas in Connecticut. Boston: Little, Brown, and Company. 1902. pp. xlviii, 703. 8vo.

Any good work on the subject of the great trade combinations of to-day will be welcomed at this time. For to a lack of sufficient knowledge on this subject may be attributed the hesitancy of some courts and legislatures and the precipitancy of others when questions involving such combinations have been presented to them. The recent work from the pen of Judge Noyes of Connecticut is a very excellent contribution to the legal learning on this important topic. It is doubly opportune, as it deals not only with trade combinations, but with their most controverted feature, namely, intercorporate relations. The actual trust, the earliest form of the modern trade combination, passed out of existence after the case of *People v. North Sugar Refining Co.*, 121 N. Y. 582 (1890). The pool or partnership of several corporations could not survive the case of *Addyston Pipe Co. v. United States*, 175 U. S. 211 (1899), in which it was

declared illegal. Since a corporation may legally be formed for the purpose of erecting and maintaining any number of different plants, there seems to be no serious question as to the legal right of an existing corporation to purchase outright the plants of others and thus effect an organization similar to that of the Standard Oil Company or the United States Steel Corporation. See *Trenton Potteries v. Oliphant*, 58 N. J. Eq. 507. The controversy as to the legality of trade combinations is, therefore, mainly reduced at the present time to a consideration of holding corporations and other corporate bodies in which the interests of separate corporations are united, the constituent bodies continuing to exist, — in other words, to a consideration of intercorporate relations; and to this topic the present work is chiefly addressed.

Judge Noyes divides his subject into five main heads as follows: I. Consolidation of Corporations; II. Corporate Sales; III. Corporate Leases; IV. Corporate Stockholding and Control; V. Combination of Corporations. The treatment of the first three topics is lucid and concise but is not marked by any great independence of discussion. The chief value of the work will be found in the able manner in which the fourth and fifth topics are handled. These are the divisions of the subject which are at present most troublesome and obscure, and these the author properly elaborates in greatest detail. Other writers on the subject have generally made conspiracy the test of the validity of all combinations. This test, however, generally proves confusing, and in the last analysis reduces itself to a question of public policy. In the present work the problem is greatly clarified by being stated in its lowest terms at the outset: "The theory of this treatise is that the validity of a combination depends upon considerations of public policy." Thus simplified, the subject is handled in a vigorous and scholarly manner. The argument is concise, yet sufficiently elaborate. The leading cases and the various anti-trust statutes, state and federal, are analyzed, and rules of public policy based on them are deduced. The principles involved receive a keen, judicial treatment, and the whole work can well be said to mark a distinct step in the progress of thought on the subject.

The indexing and the mechanical arrangement of the subject matter are excellent. The citation of cases is complete, and a full summary of all the anti-trust laws is printed in the foot-notes.

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JURISPRUDENCE, or The Theory of the Law. By John W. Salmond. London: Stevens & Haynes. 1902. pp. xv, 673. 8vo.

The word "Jurisprudence" has such a tremendous significance that most writers upon the subject have failed through trying to include too much in their treatment of it. Mr. Salmond, after noting that the term may mean either the science of law in general, including civil, international, and natural law, the science of civil law, or the science of the first principles of civil law, confines himself to the last, and therein finds abundant material for analysis and discussion. He has attempted a great work and has achieved a great success. Though the reader may not always agree with the text, he must acknowledge that it is the work of a bold and original thinker and forceful writer.

The book has so many excellences that it is difficult for one to choose any for particular praise. Perhaps the most conspicuous qualities are completeness, balance, and compactness. Nothing is omitted, nothing slighted, and nothing unduly extenuated. The defects of the work — for of course it is not wholly perfect — are rather the results of hasty judgments than of errors in construction or style. The most noticeable are a curious confusion of prescription with statutes of limitation; an abortive chapter on the divisions of the law (perhaps a hopeless subject); and a sustained use of the term "conclusive presumption." It is astonishing to find a modern writer using the term as though it meant something. When A is conclusively presumed from B, then it is the latter that is important as an ultimate fact, and the former is in reality surplusage.



Of the individual chapters that entitled "Intention and Negligence" appears to be the best. Mr. Salmond defines the former as "the foreknowledge of an act coupled with the desire of it," these being the cause of it. Negligence, he says, consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. The element of desire determines to his mind the dividing line between intention and negligence. No amount of foreknowledge of or advertence to results can make an act intentional if those results were not desired. Bravely he fights for his doctrines. Willful negligence does exist, he asserts. It is indifference. Simple negligence, on the other hand, is mere inadvertence. In this he goes farther than many will follow, maintaining, for example, that damage caused by one who drives furiously through a crowd, perceiving the danger but utterly regardless of consequences, is the result of a willfully negligent but not intentional act.

In point of arrangement the book leaves little to be desired. In construction it contains many excellent novelties. Careful summaries of all the chapters give casual readers a feeling of comfortable assurance that they will not overlook anything of importance, and equally frequent lists of selected references afford students convenient opportunities for extending their knowledge upon points of peculiar interest or difficulty.

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MASON ON HIGHWAYS, containing the New York Highway Law and all Constitutional and General Statutory Provisions relating to Highways; Highway Officers, their Powers and Duties, including the Good Roads Law of 1898 and 1901, all as amended to the Session of 1903; with Annotations and Forms. By Herbert Delavan Mason. Albany: Banks and Company. 1902. pp. xxxi, 322. 8vo.

The scope of this little volume is well indicated by the complete title. The author has set himself the limited task of re-stating, with helpful annotations, the New York statutory and constitutional provisions concerning highways, and of preparing such forms as may be needed by all who have occasion to act under these laws.

In the first part of the work he has reprinted the New York Highway Law of 1890 as amended to 1903. Under each section there are careful annotations comprising extensive cross-references, references to the prior enactments which form the basis of the present law, numerous references to other acts such as the Town Law and the County Law, and, finally, a brief statement of the substance of all New York decisions bearing on the subject matter of the section considered. It may be suggested that the value of the work as a reference manual would perhaps have been enhanced if the somewhat heterogeneous matter embraced in these citations had been classified under appropriate headings.

In the next part of the book are found, with only occasional references or citations by the author, such provisions of the State Constitution, the County Law, and the Town Law, as relate to highways, together with a few miscellaneous enactments on the same subject.

The third part of the work should prove of considerable usefulness, especially to the many public officers acting under the highway laws. Here are gathered, under references to the statutory provisions in connection with which they are to be used, one hundred and twenty-four forms prepared by the author, — the sufficiency of many of them, as he states, having already been tested in the courts. The book is made complete by a table of cases cited, a general index, and an index to the forms.



**THE HEALTH OFFICERS' MANUAL AND PUBLIC HEALTH LAW OF THE STATE OF NEW YORK**, containing the Public Health Law (Laws of 1893, Chap. 661), and all Statutes relating to the Public Health, Powers and Duties of Local Boards of Health and Health Officers, Adulterations of Food, Medical, Dental, and Veterinary Practice, Pharmacy, etc., as Amended to the Close of the Legislative Session of 1902, with Annotations, Forms, and Cross-References. By L. L. Boyce. Albany: Matthew Bender. 1902. pp. xii, 289. 8vo.

This volume is designed to aid New York boards of health and health officers in the performance of their duties by collecting within small compass the various scattered laws to which they must look for guidance. In the first and second chapters, comprising fully three fourths of the book, the author reprints the New York Public Health Law of 1893 and other statutes relating more or less directly to the preservation of the public health. Eighty-two cases in which the act of 1893 has been construed are summarized under the appropriate sections. The third chapter consists of a re-statement of the powers and duties of the officers created by the act, with appropriate comment and explanation by the author. The directions given to registering officers in regard to the method of reporting vital statistics to the Bureau at Albany are especially full and explicit. One may perhaps question whether the author has been wise in separating the substance of the third chapter from that of the first. It would render the book more convenient for reference and save much repetition of the wording of the statute of 1893 if each section of the statute were immediately followed by his comment upon it. As the volume is now arranged, the reader is forced constantly to refer from one part of it to another in order to compare the statute with the author's exposition of it; and this is made the more difficult by an imperfect system of cross-references. The book concludes with a set of forms drawn up by the author for use in complying with the provisions of the statute. The work cannot fail to prove useful to all health officials.

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**HISTORY OF THE LOUISIANA PURCHASE.** By James Q. Howard. Chicago: Callaghan and Company. 1902. pp. 170. 8vo.

This book, evidently inspired by the coming St. Louis Exposition, is a somewhat condensed statement of the political and diplomatic events which finally resulted in the peaceful acquisition by this country of a vast and rich western empire. As a preliminary to this, the history of the early exploration and settlement of this region is briefly sketched. The work purports to be merely a popular account, and as such it is rather interesting and readable; but the style is often crude, and occasionally perhaps resembles that of the proverbial Fourth of July oration. The discussion is not always judicial, and is sometimes colored by prejudice, particularly in the treatment of Jefferson, who is systematically belittled. The book will, however, serve a useful purpose in making more easily accessible the salient facts connected with a most important event in our history and in emphasizing the significance of its coming centennial celebration.

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**REPORT OF SPECIAL AND REGULAR MEETINGS OF THE COLORADO BAR ASSOCIATION.** Vol. 5. 1902. pp. 276. 8vo.

This attractive publication contains an account of the proceedings of the Colorado Bar Association at its last annual meeting and a previous special meeting. Several addresses delivered before that body are included, those of most general interest being that of Edward T. Taylor on "The Torrens System of Registering Title to Land," and that of William T. Jerome on the relation of the bar to certain present-day problems, such as the elevation of politics, the trusts, and an appointive judiciary.

**A TREATISE ON EQUITY PLEADING AND PRACTICE**, with Illustrations, Forms, and Precedents. By William Meade Fletcher, Professor of the Law of Equity Pleading and Practice in the Law School of Northwestern University. St. Paul: Keefe-Davidson Company. 1902. pp. xxxv, 1368. 8vo.

**CASES ON INTERNATIONAL LAW**, selected from Decisions of English and American Courts. Based on Snow's Cases and Opinions on International Law. Edited with Syllabus and Annotations. By James Brown Scott, Dean of the College of Law, University of Illinois. Boston: The Boston Book Company. 1902. pp. lxvii, 961. 8vo.

**PRACTICAL STATUTES**, being a Collection of Statutes of Practical Utility in Force in Ontario, with Notes on the Construction and Operation thereof. By James Bicknell and Arthur James Kappele. Toronto: Goodwin & Co. 1900. pp. xlvii, 925. 8vo.

**STATUTORY LAW OF CORPORATIONS IN PENNSYLVANIA**, including Annotations and a Complete Set of Forms. By John F. Whitworth and Clarence B. Miller. Philadelphia: T. & J. W. Johnson & Co. 1902. pp. xi, 930. 8vo.

**PRACTICE IN PERSONAL ACTIONS IN THE COURTS OF MASSACHUSETTS**. By Sidney Perley. Boston: George B. Reed. 1902. pp. xlix, 728. 8vo.

**MANUAL OF FRENCH LAW AND COMMERCIAL INFORMATION**. By H. Cleveland Coxe. Paris and New York: Brentano's. London: Simpkin, Marshall, Hamilton, Kent & Co. 1902. pp. viii, 292. 12mo.

**A TREATISE ON THE POWER OF TAXATION**, State and Federal, in the United States. By Frederick N. Judson. St. Louis: The F. H. Thomas Law Book Co. 1903. pp. xxiii, 868. 8vo.

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## WHAT IS A PROMISE IN LAW?

**I**T has been said<sup>1</sup> by a thoughtful and instructive writer that "a contract may be well enough defined as an agreement to which the law annexes an obligation."

The approval or rejection of this concise definition would seem to indicate a radical difference in the conception of a promise, and its adoption by the present writer appears to have involved him in a friendly controversy with at least two of Professor Langdell's colleagues on the Harvard Law Faculty. This article is an attempt to state the writer's position more fully than could be done in an oral discussion.

It is believed that "promise" in law is the equivalent of "contract." When a lawyer speaks of "promise," he surely is not using the word in a lay sense. It is not conceivable to me that the term "promise" as a legal idea can mean anything except words of promise to which the law annexes an obligation. When we speak of a unilateral contract, we mean a promise in exchange for which an act or something beside another promise has been given as consideration. We there clearly have in mind the idea of promise as something binding. Words of promise are considered as an offer merely, unless they have ripened into a legal obligation. Viewed from any standpoint, the legal idea of promise seems to come back to something binding, something to which the

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<sup>1</sup> A Brief Survey of Equity Jurisdiction, 1 HARV. L. REV. 56, note 1.

law annexes an obligation, and if this is so, promise and contract do not differ as terms, for a promise is a contract. It is true that one may accept Professor Langdell's definition and yet not agree that promise is equivalent to contract, and it may be argued that therefore it by no means follows that a promise is something to which the law attaches an obligation. At any rate, a radical difference of view seems to exist as to what is meant by this term "promise," and this difference leads to the argument that the law may well recognize mere words of promise as equivalent to the legal term "promise"; in other words, that the lay and the juristic use of the term "promise" are identical.

But to go further back for a moment, let us consider how we are to determine whether any given state of facts is such that we can say it conforms to a legal conception. When we say that a contract exists because we have an agreement to which the law annexes consequences, it may be replied that this is vicious reasoning in that the very question under dispute is whether the law will or will not annex its consequences to this very agreement, and that to say the law will do so in any case begs the question in dispute. This would be true if it should be argued that a given agreement is a contract *because* the law annexes consequences, but such is not the position which should be taken.

Professor Williston,<sup>1</sup> referring to Anson's criticism of the above method of reasoning to the effect that it is practically arguing in a circle, says: ". . . but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding."

Professor Williston wrote as a lawyer and from the legal standpoint; consequently it seems evident that his terms are used professionally, and that the word "promise" is employed in a legal sense.

This argument, therefore, assumes that there may be a promise in law which does not impose a legal obligation.

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<sup>1</sup> 8 HARV. L. REV. 35

But if a promise in law is always equivalent to obligation, as is here contended, there is no begging the question in Professor Williston's illustration. If my contention is correct, as a promise in law is always a "binding obligation," and such obligation is always a "detriment," the conclusion necessarily follows that a promise may always constitute a consideration, and the question in any given case is whether a promise can be found.

The lawyer answers this question by the exercise of his professional training, and says this is an agreement of such a character that the law should, on principle, annex its consequences thereto, and therefore it ought to be held a contract. When we examine a proposed bilateral contract to determine whether the parties have succeeded in their attempt, we should look at each supposed promise with a view to its legal requirements, and we may then conclude that each is a promise if it meets our professional conception of what a promise should be. There is no begging the question in such a process. It is true that in reaching our conclusion we must examine the proposed promises in every detail, and one point among others will necessarily be to ascertain just what is imported by the proposed words of promise.

To establish, then, that in any given case we have a "promise" in law, we must employ our legal acumen, and if at the close of our argument another lawyer remains unconvinced it must be left as a mooted point.<sup>1</sup>

The above suggestion of Professor Williston meets the approval of Dean Ames,<sup>2</sup> who then asks, "Is not the alleged question-begging in this case, and indeed in all cases of mutual promises, purely imaginary?" Not, as he proceeds to explain, because he conceives there is any flaw in Professor Williston's position, but because he takes another view of a bilateral contract, which he states as follows: "Everyone will concede that the consideration for every promise must be some act or forbearance given in exchange for the promise. The act of each promisee in the case of mutual promises is obviously the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For

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<sup>1</sup> See the argument of Professor Langdell upon this point in 14 HARV. L. REV. 503 *et seq.*

<sup>2</sup> 13 HARV. L. REV. 31.

the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle. The supposed difficulty in this class of cases springs from the assumption that the consideration in a bilateral contract is the legal obligation, as distinguished from the promise, of each party. But this is to overlook the difference between the act of a party and the legal result of the act. The party does the act, the law imposes the obligation. Suppose, for example, that X promises to pay A a certain amount of money in consideration of A's signing, sealing, and delivering, *animo contrahendi*, a writing containing a promise by A to convey a certain tract of land to X, and that A does sign, seal, and deliver the written promise accordingly. X is unquestionably bound by this acceptance of his offer. A, however, has done nothing beyond the performance of certain formal acts. These acts alone must form the consideration of X's promise. Indeed X by the express terms of his offer stipulated for precisely that consideration. He was willing to do so, of course, because the performance of those acts would bring A within the rule of law which imposes an obligation upon any one who executes a sealed promise. Precisely the same reasoning applies in the case of mutual promises. Each party is content to have the promise of the other given *animo contrahendi*, because each is thereby brought within the rule of law which imposes an obligation upon any one who has received what he bargained for in return for his promise."

It is first to be observed in reference to the above statement that "the act or forbearance given in exchange for the promise" to constitute "consideration" must be the act or forbearance asked for by the proposed promisor. Consequently, in bilateral contracts, the giving of a promise, *animo contrahendi*, is only sufficient when it is the promise asked for, and if a person has asked for an obligation, then mere words of promise to which no legal consequences can attach, do not furnish the promise desired by the other party and he has not received "what he bargained for in return for his promise."<sup>1</sup>

It is very true, as Dean Ames says, that the parties do the act and the law annexes the consequences, but my contention is that

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<sup>1</sup> Of course one may ask that another repeat an idle formula such as "I promise" in exchange for a promise, and upon such act taking place a unilateral contract arises. The discussion has no reference to such a case.



when one asks for a promise as a consideration he asks for words of promise of such a character that the law will annex consequences, and unless they are of such a character the consideration asked for has not been furnished.

Dean Ames's view seems to amount practically to this, that in reality a bilateral contract is the same as a unilateral, except that in the bilateral contract the act given as consideration consists of words of promise, without any regard to whether the law will annex consequences or not.

This suggestion would seem to indicate that by promise in law we do not necessarily mean anything more than a formula of words. But what is a promise if it obligates to nothing? Words of promise are a mere offer until they ripen into a promise, but then they change and cannot thereafter be withdrawn. If the promise is not to give or do something, what does it mean when we say it cannot be withdrawn; what is it but a mere nothing? Can that be a promise in law which binds to nothing, which really means nothing? Can we fairly say that in Dean Ames's illustration given above X asks simply for the formal act of signing, sealing, and delivering? Is it not evident that X does not ask for these acts, as such, in the supposed case, but that he does ask for an obligation under seal? He does not obtain what he requests because no obligation is given. Of course there might be instances in which the formal act alone is desired. Thus suppose the following case: A and B entered into a contract in writing for the sale of A's house in New York City to B. B's lawyer examined the title to the property, and objected thereto on the ground that one C, who owned the property many years before, conveyed without having his wife join in the deed to bar her dower right. C died years before, but A hunted up Mrs. C and requested her to execute a release of dower on the property which he had prepared and then presented to her. This she refused to do. A then promised to pay her \$2,000 in consideration of her executing the said release of dower, and upon that promise she did so. It subsequently turned out that Mrs. C had no dower right in the premises, because C was unmarried when he conveyed the premises and did not marry until later.

There would be a contract in this case because A asked for an act, namely, executing the formal document presented, and the widow relinquished a right, which was to abstain from writing her name.

But suppose the request had been to release her dower and not the formal signing. How could the execution of the instrument in that case support A's promise, since she had no dower to release? How does the case differ when the consideration asked for is a promise under seal, and the executed instrument has no legal effect, in other words, carries no obligation? Does the proposed provision merely ask for the execution of the paper, hoping that legal consequences may follow? It seems fair to say that what A wants is the obligation.

After a careful study of various arguments advanced, I am unable to accept the view that except as an offer mere words of promise to which no legal consequences can attach may be considered as a legal conception.

Suppose that both A and B know that A's pocket is empty, will A's proposed promise to take nothing from said pocket be sufficient to support B's promise to pay \$5? Surely A's so-called promise is nothing but an empty form of words to which no force can attach. What does A give up, or from what right does he pledge himself to abstain?

A consideration would seem to be something given by one person to another in exchange for that other person's promise. How can we say that A has given anything to B by such a proposed promise as that in the pocket case?

But if the writer has correctly understood Dean Ames both in his written views and his oral argument he maintains that A would give a promise in such a case, and that it would support the proposed counter promise.

This different conception of the legal import of promise leads to practical results in a class of cases which have been much discussed.

When a person is under obligation to do a certain thing, can he make the doing of that thing the consideration for a new promise, either from the party to whom he is under obligation, or from a third person? What does he give in exchange for the new promise? Take first the cases where the proposed promise is from the person to whom he is already obligated. In these cases it may be argued that convenience demands the recognition by law of the proposed new arrangement. But, on the contrary, by such recognition the courts would seem practically to sanction blackmail.

A, who is an experienced builder, contracts to erect your building for \$50,000 and finish the work by May 1st. You know

nothing about building, but finding that you can advantageously put up the structure at that price, you sign the contract and make all your arrangements. Building materials increase in price, and your builder on February 1st refuses to complete unless you promise to pay \$20,000 more. Non-completion of your building means ruin to you, and you choose the lesser evil and stand the loss of \$20,000. In other words, although you only bring about what you are entitled to, the law is asked to tax you \$20,000 for nothing. True, you need not promise, if you prefer ruin, but if you do use these words of promise you are bound, although nothing new is furnished and you receive only that for which you have already paid by your first promise. If we are to adhere to the settled doctrine that a promise must have a consideration, what do we find here which has been given in exchange for the promise?

It may be said that the man may otherwise break his promise. It is true that our procedure does not always adequately protect against a breach of promise, but certainly the courts do not sanction the breaking of promises, and no one doubts that in theory of law a promise should be kept, not broken. In cases where the promise is made by a third person, we do not have the encouragement of possible blackmail, but there is still the same difficulty that nothing is really furnished in exchange for the promise, there is nothing for the offeree to give. But does the case of a new proposed bilateral contract change the situation? If the offeree has no act to give, how can a proposed promise to give that act amount to anything?

Of course there may be cases in which the parties mutually agree to give up the existing contract and make a new one. To say, however, that there is any such consent in the illustration given above is to indulge in the purest fiction. The owner clearly does not consent to give up his existing rights.

There are classes of cases which may seem to conflict with this view. Thus in cases of compromise there is the settlement of a genuine dispute by a new bilateral contract. In such cases the claim on one side may have been without foundation, in which event the agreement to give up such unfounded claim does not in reality constitute a promise, because the claimant does not give up anything, as he proposes to promise to surrender a non-existing claim. That the law to-day sustains such compromise agreements is beyond question, and it is equally clear that such agreements cannot logically be maintained on the theory advanced above.

The answer is that such cases are exceptional, and should be sanctioned solely on the ground that public policy demands the exception. It is wise to quiet litigation, and on this ground the exception should be made, but it should be recognized clearly as an exception.

Again, as a general proposition, a man may commit a tort, but refraining therefrom will not and should not constitute a consideration. It is true that there are cases where the non-committing a tort is sufficient to sustain a promise, but it is observable that this occurs in cases which should never have been held to be torts, that is, where there is neither intent nor negligence — in other words, they are not, on principle, cases of tort. It is not every infringement of an absolute right which should on principle constitute a tort.

As the acts committed in this class of cases should not on principle constitute torts, this exception to the general rule of contract may well arise from the fact that it is an anomaly to treat the acts in question as torts. Public policy does not operate in such cases to prevent a contract from arising, as it does in the instances where tort should be found on principle. True, in these cases one in abstaining does not give up a legal right, but it is believed that the anomaly arises for the reason given above.

Thus, suppose a man invited to a Thanksgiving dinner promises, in consideration of a counter promise to pay him \$100, that he will abstain from eating a much vaunted turkey to be furnished at the dinner. Suppose, unknown to the host, the turkey in question was wrongfully taken from a farmer. It would seem that eating the turkey would constitute a tort, and yet the agreement to abstain from eating would probably amount to a contract, because the act itself ought not to be considered a tort.

The cases of promises within the terms of the Statute of Frauds and the promises of infants and married women at common law are also exceptional. The Statute of Frauds furnishes an ordinary example of a change brought about by statute, from which no argument as to general rules can be drawn. But the so-called promises of infants and married women at common law should never have been held to be promises or to constitute a consideration for another promise. To so hold is, in my opinion, irreconcilable with principle.

In a recent review<sup>1</sup> a suggestion is made which raises an interesting question. The reviewer says: "The proposition that the

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<sup>1</sup> 2 Colum. L. Rev. 61.

performance of, or the promise to perform, a contractual obligation, is no consideration for another promise, does not deprive any one, who wishes to secure a new promise to perform the same thing, of the power of doing so. If B in the case put wishes to secure a new promise from A that he will perform his contract with C, he can do so by giving, that is, delivering something to A as a consideration for such new promise, as, for example, five dollars, or a book. The passing of the title is a detriment to the person giving it, and is a good consideration for the new promise of A."

But does this suggestion help the situation? The correctness of the contention that under the circumstances named no second bilateral contract can be formed is assumed, and on that assumption the suggestion is made. Suppose, then, that A is under contract with C to do a specific thing, and that B, who is also desirous that A should do such specific thing, tries to contract with A, and that in exchange for A's proposed promise to do such thing B promises to pay him \$5. If a contract does not arise, it must be because A being already under contract with C cannot make a new promise to do the same thing. If, then, A sues B upon the promise to pay him \$5, B's defense is "no consideration," because A could not give the exchange promise asked; but if B sues A upon A's attempted promise, A cannot answer "no consideration," because B's promise to pay \$5 may certainly constitute a consideration, but A's answer must be "no contract," because the law will not annex the consequences of contract to his own attempted promise. That is, the law will not recognize that A can promise under such circumstances. The difficulty lies in A's position, and the entire discussion turns upon that. If the law will annex the consequences of legal promise to A's mere words of promise, there is no difficulty, but if we concede that the law will not annex consequences to A's words of promise, how can such consequences arise by B's payment of \$5? The law must still refuse to annex its consequences to A's words, and B has received nothing for his \$5. The difficulty lies with the proposed promise of A, and not with B's promise. B's promise to pay \$5 must be just as effective as the actual payment of \$5, and the entire contention goes back to A's inability to promise at all under such circumstances. It would thus seem evident that the reviewer's suggestion does not meet the objection.

Suppose, to take an extreme case, that A being under contract to do a certain thing gives what, in form, is a promise under seal

to do that same thing. Could such instrument be enforced at common law? To be consistent, one must certainly answer "no." If we maintain that such words of promise are no consideration for an exchange promise, it is because they amount to nothing, because they cannot be an obligation. If that position is sound, it cannot change matters that the words are put under seal. How can either the sealed or unsealed words amount to anything? The proposed promisor has nothing to promise, as he has entirely disposed of his right to refrain from doing the supposed act.

In the various discussions arising on this subject consideration is looked upon from the standpoint of "detriment" to the promisee, and some effect seems to be given to this term in the argument.

Consideration is something furnished to the promisor in exchange for his promise. It need be neither a benefit to the promisor nor a detriment to the promisee, and it is only necessary that the promisee shall have furnished something sufficient in law which the promisor desired in exchange for his promise.

The best modern authorities agree that benefit to the promisee is not the test, but it is still generally stated that detriment is. The word "detriment" is not used in this connection in any technical sense, but has its usual meaning in the English language as indicating any kind of harm or injury. It is very clear that a detriment in the true sense is not essential, because the consideration furnished by the promisee is often a benefit to him and no injury. Thus, suppose a case where the man is on the verge of delirium tremens. A friend offers him \$1,000 in consideration of his abstaining from alcoholic drink for six months. If he thus abstains he has furnished a consideration, and the promise to pay \$1,000 certainly arises at the end of six months. Yet here the promisee has been benefited by the abstaining. It is true he has given up a right, but that very giving up saved his life and restored his health. To call that a "detriment" is the purest fiction, and inevitably tends toward confusion of thought.

Detriment to the promisee, then, is no more an accurate test of consideration to-day than is benefit to the promisor, and being now a fiction should be discarded.

*Clarence D. Ashley.*



## THE LAW OF DEDICATION IN ITS RELATION TO TRUST LEGISLATION.

THE principles and doctrines of the common law and of equity have a twofold operation. In the first place, they create rights, and afford remedies, in and of themselves, without legislation. In the second place, they afford a justification and a basis for legislation. This second feature has a vast practical operation in this country, where legislation is confined by written constitutions, and must justify itself as constitutional; for the doctrine has arisen and is firmly established and of wide-spread application here, that the underlying doctrines and principles of the common law and of equity, so far as they are not affirmatively cut down by constitutions, remain notwithstanding the creation of a constitution; and that such doctrines and principles are to be viewed as stocks upon which by legislation new shoots or "extensions," as they are commonly called, may be freely grafted.

Thus, the common law doctrines as to common carriers, innkeepers, wharves, and the like, can be applied in legislation to modern grain elevators,<sup>1</sup> "tickers,"<sup>2</sup> stock-yards,<sup>3</sup> and this to the extent of introducing important features not provided by the common law, such as the requirement of giving bond, the requirement of a license, and provision for revocation of the license by an executive officer.<sup>4</sup> The doctrines of law and equity as to nuisance may be extended to acts which at the common law were not nuisances, nor even unlawful, as the maintaining of a building for the sale of spirituous liquors contrary to a state statute. Such legislative extension of the doctrine may even have the operation of permitting injunctions against the use of the building without trial by jury.<sup>5</sup> The principles (of ecclesiastical law origin) relating to divorce *a mensa et thoro* may be extended by legislation to mere compulsory support by a husband of his wife; and the absence of trial by

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<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>2</sup> *Friedman v. Gold & Stock Tel. Co.*, 32 Hun 4; *Smith v. Gold & Stock Tel. Co.*, 42 Hun 454.

<sup>3</sup> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 84.

<sup>4</sup> *Munn v. Illinois*, *supra*.

<sup>5</sup> *Mugler v. Kansas*, 123 U. S. 623.

jury is a feature of the extension,<sup>1</sup> as of the original doctrine. The same is true of extension of equitable doctrines as to clearing titles, and of making decrees operative directly upon land.<sup>2</sup>

Not only do the principles and doctrines of the common law and of equity serve as a constitutional support for legislation; they perform also the extremely important service of guiding the legislation in paths consonant with the traditions of our race and in harmony with our existing system, and thus point out a way not merely of effective advance, but of wise advance.

It is proposed in this article to call attention to the origin, rise, and doctrines of the law of dedication, and to point out their power and their fitness to perform an important service in "Trust" legislation. What is to be said is pertinent to any class of property, real or personal, held by any Trust, and peculiarly adapted to its affairs. To avoid burdensome repetition and differentiation, however, the law of dedication will be discussed with a view to Trust legislation in respect of Trusts which hold coal lands and oil lands.

When Blackstone wrote, the law had lately emerged from feudal conditions. It had, however, emerged, not with a doctrine and practice of exclusiveness in private land title, but with a contrary doctrine, and an immense number of concrete applications of it. From one end of England to the other, there existed rights of the general public (or of what may be called a local public, consisting of groups of small land owners) informally acquired, in the form of ways, and commons. Among these rights of common were rights to feed animals on private land; to take fish out of private waters; and — what is closely pertinent to the present discussion — the right to strip private land of physical portions of the soil, on the surface, or above the surface, or under the surface. These latter rights included rights of taking wood for building, and wood or peat for fuel, and minerals, stones, and coal.<sup>3</sup> These rights, says Blackstone,<sup>4</sup> "bear a resemblance to common of pasture in

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<sup>1</sup> *Bigelow v. Bigelow*, 120 Mass. 320.

<sup>2</sup> *Cook v. Allen*, 2 Mass. 461; *Dascomb v. Davis*, 5 Metc. (Mass.) 335; *Foster v. Abbott*, 8 Metc. (Mass.) 596; *Jackson v. Lamphire*, 3 Pet. 280; *Eitel v. Foote*, 39 Cal. 439; *Jackson v. Babcock*, 16 N. Y. 246; *Sullivant v. Weaver*, 10 Ohio 275; *Freeman*, Judgments, sec. 307; *Parker v. Overman*, 18 How. 140; *Langdon v. Sherwood*, 124 U. S. 74.

<sup>3</sup> 2 Bl. Com. 34.

<sup>4</sup> 2 Bl. Com. 24.

many respects, though in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary and those afore-mentioned are a right of carrying away the very soil itself."

Actual titles of this class had, in great part, arisen, during some centuries preceding Blackstone, in an informal manner. They had undoubtedly originated in most instances in permission; but beginning as privileges, they had gradually hardened themselves into title.

Every system of law, when confronted with existing conditions the origin of which cannot be historically traced, conjures up a theory of origin. In respect of these different classes of easements and profits, there were in Blackstone's time, and there still are, theories upon which existing titles of this class had arisen, and upon which, therefore, new titles of this class might arise. Some of these titles were supposed to have arisen by custom; others by prescription; others by formal conveyance.

Blackstone states the theories; but, with his characteristic bluntness, he also tells us how these titles in fact arose. He says that they arose, in fact, *out of the necessities of the public*. Some of them, he says,<sup>1</sup> were

"originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the lands without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the unenclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appendant; which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England."

Public policy, that is to say necessity, — growing of course out of the feature of local monopoly, — is therefore capable by our law of creating, and in fact to an enormous extent has created, public rights, or rights of groups of outsiders, in private land. Indeed, the whole story is told by the name of one class of these rights, — a right of taking necessary wood, for fuel or for construction, from private land. This class of rights is called in our law "estovers,"

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<sup>1</sup> 2 Bl. Com. 33.

which, as Blackstone points out,<sup>1</sup> is the French equivalent of our word "necessaries." These commons of "necessaries," says Blackstone,<sup>2</sup> arise

"from the same necessity as common of pasture : viz., for the maintenance and carrying on of husbandry ; common of piscary being given for the sustenance of the tenant's family ; common of turbary and fire-bote for his fuel ; and house-bote, plough-bote, cart-bote, and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences of his grounds."

The doctrine thus formulated and recognized when Blackstone summarized the law, is in full force in England to-day. As to the various titles which in England have arisen under them, the exact manner of acquisition was determined by local conditions which in England have now to a considerable extent passed away, and in this country have never existed. The result is, that the theories under which such titles are supposed to have arisen in England, and may arise there now, are not suited to modern times. But while Blackstone, in his character of historian and philosopher, tells us that these theories are unfounded, nevertheless they had become operative doctrines, and imposed limitations upon the courts.

Some of these limitations were as follows :

Easements proper — that is, rights of going over, or doing something else upon another's real estate, but without stripping it — may, in theory of law, have arisen, and may now arise, by grant or by custom. When they arise by custom, they may arise in favor of the entire public of a community. Profits *a prendre*, on the other hand, — that is, rights of taking away physical portions of the realty, such as coal, — have in theory of law arisen in the past, and can now in theory of law newly arise, only by grant or by prescription, and cannot in theory arise in favor of the general public. In the case of both easements and profits, moreover, acquisition by custom or by prescription requires a long period of time.

These theories, therefore, invented by the courts generations ago in aid of public or quasi-public rights, gradually became under modern conditions incapable of effectual operation ; and a new theory was needed. The English courts met the occasion by seizing upon a doctrine which had been loosely employed in a

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<sup>1</sup> 2 Bl. Com. 35.

<sup>2</sup> Ibid.

few cases in the eighteenth century, but was so little regarded in Blackstone's time as not to be alluded to by him, — a doctrine which the courts, inventing the word, termed "dedication." Under this doctrine, as the courts finally formulated it, a private owner may, by informal action extending over a very limited time, or even by one decisive act, vest in the public, or in a part of the public, any one of a great variety of interests in his land. The most familiar example of dedication is presented in the case where a man moves his fence back, and thus, in the popular phrase, "throws" a piece of his land "into the street."

With this doctrine — first brought prominently into view in the nineteenth century — the English courts found a weapon which they soon began to use with effect. Under it they in one case recognized the creation of a public easement in private land, by informal dealings of the land-owner with the public over as short a period as eighteen months;<sup>1</sup> and in another case permitted a jury to find an instantaneous dedication;<sup>2</sup> and they also dispensed with the prerequisite of use by the *whole* of the general, or of a local, public; for in 1800 they announced that mere occasional use may support a title in the public by dedication.<sup>3</sup>

Owing to historical and local reasons, the law of prescription and custom has received an immense development in England, and the law of dedication but a narrow one. In this country, for historical reasons, we find precisely the contrary. Here, up to a comparatively recent period, the land was held in small farms, and there were very few customary or prescriptive rights other than easements of way; but when, with the advent of modern conditions, the question of informal acquisition by the public of rights in private land began to arise in this country, such rights, if they were to arise at all, had to arise like Jonah's gourd. They could not be rested upon ancient custom; and the result has been that while the law of dedication exists only as a grain of mustard seed in England (occupying less than seven pages in the latest English digest, and there classed as a mere sub-head of the law of ways), it occupies, in the American Digest, Century Edition, one

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<sup>1</sup> North London Railway Co. v. St. Mary Vestry, 27 L. T. 672; 21 W. R. 226.

<sup>2</sup> Reg. v. Petrie, 4 El. & Bl. 737 (1829).

<sup>3</sup> Mildred v. Weaver, 3 F. & F. 30. See also Powers v. Bathurst, 49 L. J. Ch. 294; Greenwich Board of Works v. Maudslay, L. R. 5 Q. B. 397; Grand Surrey Canal Co. v. Hall, 1 Man. & G. 392; Rex v. Leake, 5 B. & Ad. 469; Grand Junction Canal Co. v. Petty, 21 Q. B. D. 273.

hundred and eleven similar pages, with elaborate classification and subdivision. Not only has it received a far greater number of individual applications, in reported decisions, in this country than in England, — and that in a very brief space of time, — but it has received in this country a much broader development, owing to conditions peculiar to a new country. Thus, under decisions in this country, land may be dedicated for a burying ground;<sup>1</sup> for a public square or common;<sup>2</sup> for a public landing-place on a water front;<sup>3</sup> for school purposes;<sup>4</sup> for religious purposes;<sup>5</sup> for irrigation purposes;<sup>6</sup> for a court-house and jail;<sup>7</sup> for a college;<sup>8</sup> for public uses generally.<sup>9</sup>

It need hardly be said that the law of dedication does not go so far as to enable the owner of land to foist it upon the public against their will; and that therefore the consent of the public to a given dedication is essential in order to burden them with the responsibilities of ownership; but their endorsement of a dedication may be shown by mere informal acts, and, in fact, can be shown in no other way.<sup>10</sup>

Dedication need not be, and rarely is, of an absolute and exclusive title in the land, but is commonly of a mere partial interest of some kind in the land, — as in the familiar case of throwing land into a way to widen it, where nothing is dedicated to the public but a right to pass over the land.<sup>11</sup>

Theoretically there must be intention on the part of the private owner, to make an effectual dedication; but such intention may

<sup>1</sup> *Beatty v. Kurtz*, 2 Pet. 566; *Davidson v. Reed*, 111 Ill. 167; *Pierce v. Spafford*, 53 Vt. 394.

<sup>2</sup> *Huber v. Gazley*, 18 Ohio 18; *Pierce v. Roberts*, 57 Conn. 31; *Rhodes v. Brightwood*, 145 Ind. 21; *Price v. Plainfield*, 11 Vroom 608; *Cincinnati v. White*, 6 Pet. 431.

<sup>3</sup> *Village of Mankato v. Willard*, 13 Minn. 13; *Gardiner v. Tisdale*, 2 Wis. 153; *Coffin v. Portland*, 27 Fed. Rep. 412; *Godfrey v. City of Alton*, 12 Ill. (2 Peck) 29, 52 Am. Dec. 476.

<sup>4</sup> *Klinkener v. School Directors*, 11 Pa. St. 444; *Singleton v. School District*, 10 S. W. Rep. 793; *Carpentia School District v. Heath*, 56 Cal. 468.

<sup>5</sup> *Hollar v. Herney*, 4 Ky. Law Rep. 988.

<sup>6</sup> *Delaney v. Boston*, 2 Har. (Dela.) 489.

<sup>7</sup> *State v. Travis County*, 85 Tex. 435.

<sup>8</sup> *Village of Weeping Water v. Reed*, 21 Neb. 261.

<sup>9</sup> *Chicago, etc., Co. v. Joliet*, 79 Ill. 25; *Doe v. Attica*, 7 Ind. 641; *Young v. Mahaska Co.*, 88 Iowa, 681.

<sup>10</sup> *People v. Davidson*, 79 Cal. 166; *Riley v. Hammel*, 38 Conn. 574; *Cook v. Harris*, 61 N. Y. 448; *Shanks v. Whitney*, 66 Vt. 405.

<sup>11</sup> See *Manly v. Gibson*, 13 Ill. 308, 313; *St. Mary v. Jacobs*, L. R. 7 Q. B. 47, 53; *Verplanck v. City of New York*, 2 Edw. Ch. 220, 225.



be, and in almost every instance is, shown exclusively by his physical acts; and the requirement of intent upon his part is hardly more than theory. Indeed, the private owner's action is ordinarily such that he would be estopped to deny the existence of an intention on his part.

The fact that the public use begins by express consent does not prevent the use from hardening into title.<sup>1</sup>

Where he who dedicates has himself only a limited title, his dedication goes as far as his title. Thus, if one who has a leasehold interest dedicates, he dedicates the leasehold; or where the land is subject to an existing easement, the dedication is subject to that easement.<sup>2</sup>

Dedication, although usually made without specific compensation, nevertheless may be made for a money consideration. Thus, where proceedings were had to condemn land for a street, it was held that if the proceedings were invalid, but the owner had accepted the condemnation award regardless of the validity of the proceedings, his act amounted to an effectual dedication, notwithstanding the fact that he had done it for money.<sup>3</sup> It seems to follow that a dedication may be none the less effectual because one qualification imposed in connection with it is that of paying upon each occasion of use.

A public easement arising by dedication may arise at once, by one decisive act.<sup>4</sup> This doctrine has repeatedly been applied in this country, perhaps most frequently in cases where the dedication was held to have been made by publishing a plan showing a park, a street, or the like.<sup>5</sup>

Dedication, once made, is irrevocable.<sup>6</sup> In fact, the public cannot lose their rights by failure to exercise them.<sup>7</sup>

Dedication of a certain interest in land by the general owner leaves in the general owner the exercise of all other rights of ownership consistent with the dedication, including the right of possession, in so far as it is consistent with the public easement.<sup>8</sup>

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<sup>1</sup> *City of Macon v. Franklin*, 12 Ga. 239.

<sup>2</sup> *Morant v. Chamberlin*, 6 H. & N. 541; *Schenley v. Commonwealth*, 36 Pa. St. 29, 58.

<sup>3</sup> *Rees v. Chicago*, 38 Ill. 322, 335.

<sup>4</sup> Cases cited above.

<sup>5</sup> See many cases above cited.

<sup>6</sup> *Cincinnati v. White*, 6 Pet. 431; *Commonwealth v. Alburger*, 1 Whart. 469; *Getchell v. Benedict*, 57 Ia. 121; *Dawes v. Hawkins*, 7 C. B. N. S. 848.

<sup>7</sup> *Dawes v. Hawkins* just cited.

<sup>8</sup> *St. Mary Newington Vestry v. Jacobs*, L. R. 7 Q. B. 47.

The law of dedication is based, in all the decided cases, upon the proposition that a person cannot lead the general public, or a local public, to base their action and build up their fabric of life upon the theory of permission of a certain kind, on his part, in respect of his land, and, when they have thus accommodated their affairs to this expectation, violate the confidence thus invited.

It is true that, up to this time, the law of dedication has been actually applied, by the decided cases only to easements in favor of the general public, or of a local public. A broader application of it, however, has not in most jurisdictions been expressly denied; and the nature and origin of the law of dedication, and its foundation principles, and the whole drift of the decided cases, point to the conclusion that the doctrine, whenever the question shall arise, will be applied also to profits, — that is, to rights not merely of using another's real estate, but of stripping it (or having it stripped) by, or for the use of, the general public, of portions of the soil, — as of coal or oil; and that, in fact, such public rights will be found to have been already created and now to exist in the public.

A number of different lines of thought seem to lead inevitably to this result.

In the first place, the distinction between easements in the strict sense, and profits, is quite arbitrary. In a multitude of instances, for example, of easements of way, there is no appreciable value to the private owner, in the soil over which the way passes, and his property is, for all practical purposes, as completely taken away from him, by the easement, as if the public had a right to take away portions of the soil.

In the second place, the distinction between easements and profits is highly technical; so technical, in fact, that Blackstone in his discussion of incorporeal hereditaments alludes to no such distinction. In many modern books, too, profits are treated under the general head of "Easements."

In the third place, the limitations of the rule as to informal acquirements of profits were made and fixed with a view to conditions which do not now exist in this country with reference to land like coal and oil tracts. When those limitations became established, there were no means of transportation of coal and minerals to any distance, and the market was consequently a local market. Moreover, these rights at that time were seldom conditioned upon payment for what was taken, and in view of this,

the danger of exhaustion of a local supply had an important bearing. It was clearly to the interest of the local public that such a deposit should not be extravagantly used and prematurely exhausted; and exhaustion of it, owing to the lack of transportation facilities, might then mean local ruin. To allow the *entire public* of a community to take valuable deposits from private land without payment might, in a given instance, risk complete exhaustion in a comparatively short time; and in many cases, such indiscriminate right, if recognized, could not readily be restricted within reasonable limits. This is, in fact, the reason assigned by the authorities for the refusal to extend to profits the doctrine of informal acquirements by the public or by a community generally.<sup>1</sup>

In view of these considerations, the line between easements proper and profits in respect of informal acquisition by the general public, merely illustrates the general rule that the law responds accurately to the public needs as they exist at a given time, and invades private rights only so far as the public needs at that time require.

That the law has never seen anything erratic in the existence of rights of profits in a mere local public, is shown by the fact that such rights, under grant, have always existed, and still exist in England, and in this country also.<sup>2</sup>

It may be objected that in all the decided cases where dedication has been implied from user and acquiescence, the members of the public have themselves gone upon the land to enjoy the easement. This results almost inevitably from the nature of easements, which cannot in most instances be enjoyed by the public entirely through the agency of the owner of the fee. But if it be once admitted that the public could under proper circumstances acquire a profit by dedication, — as for example a right to go upon coal lands and dig coal, upon payment of a fair price, — it is difficult to see any fundamental reason why the public right to the coal might not be conditioned on leaving the owner of the fee in possession and management, and allowing his agents and servants to mine the coal for the public, so long as he should conform his management to the public rights. Such a condition would change, not the essential nature of the right, but only the manner of its enjoyment. An analogy would be found in the case of a public easement acquired by

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<sup>1</sup> 2 Washburn, Real Property, 5th ed., p. 313 and n. 2.

<sup>2</sup> Willingale v. Maitland, L. R. 3 Eq. 103; Goodman v. Saltash, L. R. 7 App. Cas. 633; Green v. Putnam, 8 Cush. (Mass.) 21.

dedication over a public wharf, the owner of the wharf retaining the active management through his stevedores. And finally, if the public might possess by express dedication a right to have coal mined and sold to them at fair prices, why might not the dedication of such a right be implied from a course of dealing between owner and public exactly along those lines?

Again, if it be asked how widely this doctrine would apply, and whether it would extend to every case where mineral deposits are habitually mined or quarried and sold to the public, the answer is that, as shown above, necessity is the basis of the doctrine, and that dedication would be found to have taken place whenever the public had become practically dependent upon particular deposits. If it be asked also how large a public should be held to have acquired rights by dedication, that question may be similarly answered.

It has already been expressly admitted that the application of the doctrine of dedication now under discussion, would involve crossing some technical lines, which have in the past been regarded as circumscribing the doctrine. But the question is whether, now that the necessity has arisen, the courts would continue to respect these artificial boundary lines.

The doctrine of dedication, so far from being hampered in its application by mere technical distinctions, was called into existence for the very purpose of escaping from the technical rules and limitations. Its very vital breath, and its justification for existence, lie in disregard of existing technical limitations, and in recognition of the necessity for a resort to broad views. Consequently, as fast as any new subject or phase of public rights has been presented to the courts, they have never hesitated to apply the doctrine of dedication to the new situation. When a given proposition rests upon principle, the question of its applicability in a given instance, or of the extension of it to a new situation, is to be determined, very largely, by the principle upon which it rests; and if public necessity has now come to require, in respect of coal and oil lands, for example, the application of the doctrine of dedication, the authorities justify the belief that the application will be made.

It is hardly necessary to say that the law of dedication will not be applied where it cannot be applied with practical results; and this must be borne in mind with reference to the question of the applicability of the doctrine of dedication to coal and oil lands.

But in the case of coal or oil lands the two conditions, (*a*) of paying for the coal or oil, as taken, and (*b*) of leaving the private owners in possession and management (precisely as in the case of a public easement, acquired by dedication, over a private wharf), would meet all practical requirements.

It may therefore be said that the origin and the rapid and free growth, during the last century, of the doctrine of dedication indicates that, if there has now arisen a necessity for the application of it to rights in coal and oil lands, for example, the courts would so apply it as liberally and freely as they have applied it in favor of informal acquirement of easements, in the strict sense; and it may be well that at the present time coal lands and oil lands have on a great scale already become irrevocably dedicated to the public, to the extent of an absolute right in the public to have coal from them upon payment of a reasonable price, subject to the right of the private owners to manage them, if and so long as they will do so properly, — as the owner of the public wharf may manage it through his stevedore.

If dedication may thus have taken effect upon certain coal lands, oil lands, and the like, it may be in process and may now be taking effect, and may hereafter take effect, upon properties of this character which have been but lately opened, or may hereafter be opened.

What has thus far been urged in favor of an existing dedication of coal and oil lands to the public, has been based entirely on the common law. But it is important to observe that the ultimate establishment of such public rights is by no means dependent upon the acceptance of the writer's argument to its full extent. Even granting that the doctrine of dedication should be held by the courts to have, in its present state, limitations which prevent it from having such an operation without legislation, nevertheless the existence of that doctrine, with the scope which it admittedly has, seems unquestionably to support legislation by a legislative body of proper jurisdiction, — the question whether Congress is such a legislative body is not now being considered, — (*a*) to make the necessary extensions of the doctrine, and (*b*) to provide that the production and public marketing of coal, mineral oil, and the like, for a certain length of time, shall *ipso facto* amount to a dedication such as is immediately above suggested.

But it is not only along the line of dedication that legislation might deal effectively with property such as that under discussion without departing materially from established principles. Recent discussions as to the exercise of the right of eminent domain over coal lands have seemed to assume that there must be an outright taking, or none. On the contrary, if and in so far as a state or Congress has the power to take, the taking might be, not of the fee, or of an exclusive right to coal or oil in the soil, — to be paid for all at once, — but of an easement (in Blackstone's broad sense of the word), or a profit in favor of the public to have coal or oil produced for them, by the general owner of the land in question, and sold to them, or to those who will supply them, at a fair price. A taking in this form would vest in the public precisely the right which the law of dedication perhaps has, in the case of certain coal and oil lands, already vested in them, or would vest in them, if applicable. It would vest in the public precisely the sort of right and interest which *Munn v. Illinois* declared to have become vested in the public through the voluntary action of the owners of the grain elevator there in question; with the added element, however, of irrevocability and permanency of the public right. Eminent domain legislation of this character would be simply and absolutely in harmony with the unbroken course of growth of our institutions for hundreds of years past. It would be legislative action precisely on the principles, and along the lines, of the action of the courts in creating and developing the existing doctrine of dedication, and in harmony with the legislative action of the state of Illinois, which was declared by the Supreme Court of the United States, in *Munn v. Illinois*, to be not only valid, but in conformity with the traditions of our legal system. Such legislation would entail no pecuniary burden; for all that would be taken from a coal-mine or oil-land owner would be the power (admitting that in a given case he had it) to keep his coal or oil — worthless except for marketing — out of the market, and to refuse to produce and sell at a fair price; and for this no jury would give him, or would be warranted in giving him, much more than nominal damages. His compensation would come from a fair price for his coal or oil.

Such exercise of eminent domain would create in the public a right of a familiar class, and capable of being defined and enforced by statute or by the general law, upon perfectly well defined lines.



It would be free from the objections to public governmental ownership and control.

It may be said that if the general owner of the coal or oil lands should refuse or fail to operate his property fairly and efficiently, and in harmony with the public right, it would be necessary to take possession from him. That proposition is sound; but it applies also to all the existing steam and street railroads of the country; the telegraph and telephone lines; the gas companies, the water companies, and all the vast public service corporations; the great life insurance companies; and the national banks. Any of these are liable to receivership; and this procedure is constantly being employed. At one time, within a few years past, one fourth in value and in mileage of all the railroads of the country were being run by the courts. In fine, it is no objection to the creation or clear recognition of a public right, that that right may have to be enforced, and can be enforced. It is no answer to the imposition of a trust, where such course is necessary, that the trustee may have to be temporarily or permanently removed. Receivership, and judicial management in exceptional cases of breach of duty, are remote from governmental ownership and control in the ordinary sense of the phrase.

In closing, it may be added that *Munn v. Illinois*, and the numerous similar decisions, unquestionably disclose a mode of relief from controversies — in the case of such a taking — over the prices to be charged to consumers, and other details, by showing that all matters of detail, including price, may be fixed by statute, and that the general owner of the land may be subjected to the requirement of license and bond.

It is proposed, in a subsequent article, to present some considerations in support of the present competency of Congress to enact such legislation as is above suggested, and to indicate the form which such legislation should take.

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## ROMAN AND CIVIL LAW IN AMERICA.

**T**IMES change and we change with them. A few years ago a large majority of lawyers in England and in our own country were in conscious or unconscious sympathy with the views of Blackstone, and thought of the civil law as something closely associated with arbitrary power in government and persecution in religion. As for the especial jurisprudence of the United States, there was a vague idea that something like the Code Napoleon existed in a little corner of the Union called Louisiana, but just why or how it happened to be there was a matter of languid interest. The events of the last five years have changed all that. It has suddenly occurred to us that Roman and civil law lie at the basis of social life not only in Louisiana but in Porto Rico, Cuba, and the Philippines, as well as in Lower Canada, Mexico, Central America, and South America. The subject forces itself on the attention of the student, and challenges his investigation, if only on the lowest ground of possible advantage to himself in his professional career.

In discussing our subject in a brief and very general way, it is necessary to consider the development of law in France and Spain; for, whatever elements of Roman and civil law we have in the Americas came, broadly speaking, through and from those two countries; whatever may have been contributed by Portugal being of Spanish type and not requiring special discrimination.

Beginning with France, while it was still known as Gaul and was a Roman province, it was governed by Roman methods and received the Roman law of the early imperial period. The Empire of the West went to pieces in the fifth century of our era, some fifty years before the compilations of Justinian. The barbarian conquerors could overrun the country, but they could not divest themselves of the reverence they had for the institutions of the empire, and especially for the system of law which, in its scientific development by the early jurists, appealed to them in the same way that Greek sculpture appeals to an American artist; and so we find them framing codes for their conquered subjects based on Roman law, no doubt preparing such compilations with the help of such jurists as they could employ. Thus, we have the Edict

of Theodoric, the Ostrogoth, who for a time reigned over a part of Southern Gaul, a work probably prepared by Cassiodorus, a Roman jurist and philosopher who was attached to the court of Theodoric. This code was promulgated about the beginning of the sixth century. We find next, as underlying part of the French law, the Breviary of Alaric II., sometimes called the Roman law of the Visigoths, or West Goths, which had its domain in Southern Gaul because Southern Gaul as well as Spain was part of the Visigothic kingdom. This important compilation may be noticed again when we come to the law of Spain. Another code was the compilation known as the *Lex Romana Burgundiorum* prepared by Gundobald of Burgundy in the early part of the sixth century, for the use of his Roman subjects in the territory that afterwards became a portion of France.

But French law was not destined to be entirely Roman in its character. Another important influence was added in the form of what we call the "barbarian laws" proper, such as those of the Salian Franks, the Ripuarian Franks, and the like. These were Teutonic customary laws, and were what might be expected from such a people at such a period in their development; systems in which the primitive ideas of family, clan, status, torts and penalties play a large part.

To the influence of these customary laws may be added the constant modifications made by legislative power of some kind. Thus, an important factor in the formation of the French law is found in the "Capitularies," or laws issued by the kings of the "first and second race," from the sixth to the tenth century, and which received the approbation, either express or implied, of the councils or the assemblies of the people. Following these were the ordinances of the "third race of kings," from the time of Hugh Capet, in the latter part of the tenth century, down to the French Revolution. The power of the monarch was more and more displayed in these edicts, which resembled, in a way, the constitutions of a Roman emperor. A prominent example is found in that ordinance of Louis XIV. concerning maritime law, which has played such an important part in modern commerce and admiralty.

And here we may refer to the difference which was so marked in France between what was known as the Country of the Written Law on the one hand, and the Country of the Customary Law on the other. The former was simply that southern portion which had

fallen under the dominion of the written Roman codes which we have mentioned of the early part of the sixth century; the latter was the northern portion of France, where the customs derived from Teutonic sources, from local grants and charters, and from the feudal system as differently applied in different provinces, grew into a body of local customary law.

There were many of these different jurisdictions, each with its custom, receiving its name from the province in which it prevailed, such as the Custom of Orleans, the Custom of Normandy, the Custom of Brittany, and the like; but naturally one of the most important among them was what was called the Custom of Paris. That city had become more and more the center of civilization and learning, and was distinguished for its revival of the study of Roman law, especially in the eleventh and twelfth centuries. When, therefore, in the seventeenth century, France began to take up seriously the work of colonization in America, and to provide some kind of law for her possessions in the western world, it was prescribed that the laws, edicts, and ordinances of the realm, of a general character, and the Custom of Paris should be extended to these colonies.

The system thus transplanted may perhaps be best illustrated by comparing it with the French language itself, which had grown up in much the same way, and had been formed of similar factors. The legal system, then, while it contained many elements of Teutonic origin, was Latin at its base. Roman Law, as developed by the studies and labors of the mediæval jurists, had been wrought into it and had contributed the form and style, the logic, the maxims, the elementary principles of juristic philosophy to this body of legal doctrine.

In proceeding with the study of Roman and civil law in the Americas, we may begin with what we now call the Dominion of Canada. The first settlement was made by Jacques Cartier, a French navigator, who sailed up the St. Lawrence in 1535. Quebec was founded in 1608, some years, therefore, before the Pilgrims landed at Plymouth Rock. Montreal became an outpost and point of departure for fur trade and discovery. Canada, or New France, was a vast domain, extending as far to the west and southwest as her pioneers could explore and possess. It was to this immense territory that the laws, edicts, and ordinances of France and the Custom of Paris were extended; and so the elementary principles of Roman law may be said to have emigrated

slowly, indeed, but surely, from the banks of the Tiber to the banks of the St. Lawrence and the Great Lakes. As the French explorers pushed their way to Detroit, Mackinac, and the Upper Mississippi, and established their settlements and posts, they took this system with them. It is a curious fact that, in theory at least, the Custom of Paris was in force in Michigan and in Wisconsin, a part of that territory, down to the year 1810, when the legislature of Michigan, declaring substantially that it did not know what the Custom of Paris was, and that there were no easy means of finding out, enacted a statute abolishing the whole system and adopting the principles of law that prevailed in the other states of our country so far as applicable to the situation.<sup>1</sup>

Canada remained under French domination for about one hundred and fifty years. In 1759 the English army under Wolfe captured Quebec. In 1760 the English conquest of Canada had been completed, and by the treaty of 1763 the entire territory was transferred to England. The question, of course, presented itself as to what should be done, in the legal way, with these new possessions. A part of the vast domain was inhabited by French people who had been living for generations under the laws and ordinances of France and the Custom of Paris; that is, under the system partly Roman and partly mediæval, which has already been briefly described. The English government acted wisely. The principles of English law were introduced in criminal matters,<sup>2</sup> but private law in civil matters was left undisturbed. It resulted that in Canada that portion which had been largely settled, and which is now called the Province of Quebec, retained its system of private law in civil matters derived from France; while in the portion of territory lying farther west, and which was to be settled by English emigrants, a different result was reached.

By the Statute 31 George III., Chapter 31, enacted in 1791, Canada was divided into two parts, Lower Canada and Upper Canada; and the legislature of Upper Canada in due time adopted English law as the basis of her institutions. In 1867 the Dominion of Canada was established, but a specific account of its different provinces need not here be given.

Returning to the Province of Quebec, or Lower Canada, we find, therefore, that Roman and civil law still constitute the basis of juris-

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<sup>1</sup> Interesting references to this legislation may be found in the cases of *Lorman v. Benson*, 8 Mich. 18, 25; and *Coburn v. Harvey*, 18 Wis. 156, 158.

<sup>2</sup> By the Statute of 14 George III., Chapter 83.

prudence so far as they were introduced during the seventeenth century. The legal system has been gradually developed and improved along its original lines, and in the year 1866 a civil code of Lower Canada was promulgated which is an excellent specimen of juristic work. It follows the general theory and logic of the French code, and contains, therefore, many elementary principles of Roman and civil law; but it is, of course, different in some local details, and it includes an elementary treatise on commercial law.

This code contains four books. The first book concerns persons and their status. The second book concerns property, its ownership and modifications. The third book concerns the acquisition of property by succession, donation, testament, and the force of obligations; and also treats of obligations in general, as arising from contract, quasi-contract, tort, neglect, and the operation of law; and of the different kinds of obligations and their extinction. It then takes up the different kinds of contracts, and next deals with privileges and mortgages, and the formalities of recording real rights; and concludes with the rules in regard to prescription, both as to the acquisition of property and as to the barring of suits. The fourth book is a brief code of commerce, treating of bills, notes, and checks, merchant-shipping, carriers, insurance, bottomry, and respondentia.

They have also a code of procedure in Quebec upon the details of which we need not dwell. In brief, we find in the Dominion of Canada, as among ourselves, a part of the country looking to the civil law as fundamental and the rest to the English law.

Turning now to that other great colony established by France in the last years of the seventeenth century and to which LaSalle gave the name of Louisiana, we find its legal history in some respects quite similar. The Louisiana of LaSalle was not bounded by the limits of the state which now bears that name. It extended in theory at least from the Gulf of Mexico to the dim regions which now constitute British America, and westwardly to the Rocky Mountains, and possibly to the Pacific. It formed part of a plan of empire intended to reach from the Gulf of St. Lawrence by way of the lakes to the Gulf of Mexico. Soon after the first feeble colony was planted near Biloxi, its entire commerce, with a considerable control of its government, was granted by charter to Anthony Crozat, a French merchant; it being provided that the territory as described should remain included under the style of the government of Louisiana and be a dependency of the govern-



ment of New France, or Canada, to which it was to be subordinate. By another provision of this charter, the laws, edicts, and ordinances of the realm, and the Custom of Paris, were extended to Louisiana. The system of law thus introduced was the same as that which had been established in Canada, or New France, and continued to develop on these lines until the year 1763, when France, by a secret treaty, ceded to Spain all that portion of Louisiana which lay west of the Mississippi, together with the city of New Orleans, and the island on which it stands. Soon after, by the treaty of Paris, the boundary between the French and British possessions in North America was fixed by a line drawn along the middle of the Mississippi, from its source to the river Iberville, and thence by a line in the middle of that stream and Lakes Maurepas and Pontchartrain to the sea. France ceded to Great Britain the river and port of Mobile and everything she had possessed on the left bank of the Mississippi, except the town of New Orleans, and the island on which it stood. As all that part of Louisiana not thus ceded to Great Britain had already been transferred to Spain, it follows that France had now parted with the last inch of soil she held on the continent of North America.

With the Spanish domination in Louisiana, there came some elements of Spanish law and jurisprudence. The first Spanish governor, O'Reilly, caused a code of instructions to be published in reference to practice, according to the laws of Castile and the Indies, to which was annexed an abridgment of the criminal laws, and some directions in regard to wills. From that period, as Judge Martin states in his history,<sup>1</sup> it is believed that the laws of Spain became the sole guide of the tribunals in their decisions; but, as these laws and those of France proceed from the same origin, the Roman law, and there was great similarity in their dispositions in regard to matrimonial rights, testaments, and successions, the transition was hardly perceived before it became complete, and very little inconvenience resulted from it.

We defer for a moment more an account of the origin of Spanish law and jurisprudence, and follow out the early history of Louisiana after it became an American possession. In the last months of the eighteenth century, a treaty was concluded between France and Spain, by which the latter agreed to restore to France the province of Louisiana. France, however, did not receive for-

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<sup>1</sup> Martin's Louisiana, 2d ed. p. 211.

mal possession until November 30, 1803, when, in the presence of French and Spanish officers, the Spanish flag was lowered, the tri-color hoisted, and a formal delivery made to the French commissioner.

France remained in actual possession only twenty days. The province had already, in April, 1803, been ceded to the United States, and on December 20, 1803, the United States took possession. In 1804, the Territory of Orleans was established by act of Congress, including in its boundaries about the area of the present State of Louisiana. The rest of the immense purchase was at first erected into the District of Louisiana; then in 1805, into the Territory of Louisiana, and then in 1812, into the Territory of Missouri. And so the present State of Louisiana, on the one hand, and the other states which have been carved out from the remainder of the Louisiana purchase parted company in the juridical way; Louisiana continuing its adherence to the civil law in many important matters, and the other states receiving what we loosely call the common law, that is, the English and American law, brought in the natural and normal way by immigration of pioneers from the common law states.

Thus far, we have spoken, of course, of municipal law in civil matters. As for the criminal law, it was felt that it would not be proper to continue the Spanish methods, and it was understood that the Territory of Orleans would not be admitted to statehood until some change had been made in this matter. Accordingly, in 1805, by two territorial statutes which were admirably drawn, and which are still practically in force with a few amendments, it was provided that the common law of England should be the basis of jurisprudence and practice in criminal cases.

In 1808 a civil code of law was adopted by the territorial legislature in Orleans, based to a considerable extent on a draft of the Code Napoleon, and prepared by Messrs. Brown and Moreau-Lislet. This code was revised in 1825, and at the same time a code of practice was promulgated which is a model of brevity and simplicity, and which has been very little amended,—so little that the number and order of the articles have remained unchanged.

By an act of 1828 all the civil laws in force before the promulgation of the codes, with a single exception, were declared abrogated. It was decided, however, by the Supreme Court that the Roman, Spanish, and French civil laws, which the legislature thus

repealed, were the positive, written or statute laws of those nations and of Louisiana, in so far as they were introductory of new rules, and not those which were merely declaratory; and that the legislatures did not intend to abrogate those principles of law which had been established or settled by decisions of the courts of justice. The result is understood to be that the codes of Louisiana — which were again amended, in 1870, for the purpose chiefly of omitting matters rendered obsolete by the late Civil War — are interpreted when necessary, first, by the decisions of her courts, and secondly, in the absence of such, by the principles of civil law so far as they may be properly applied to the subject matter and to the conditions of modern life.

No code of commerce or of evidence has ever been adopted in the State of Louisiana, and it has been settled that in commercial matters we will follow the law merchant of England and of the other states of the Union, and that in matters of evidence we will be governed by English and American elementary rules and decisions, so far as they are not modified by statute or code. When it is remembered that in the federal courts we have the admiralty and chancery system in full operation, it will be seen that the strata are numerous which have been from time to time deposited in the legal alluvion which has been formed about the mouth of the Mississippi. So far as the elementary laws of person and property are concerned, and the equally important law of obligations is to be applied, we may be said in Louisiana to be a civil law state. So in the matter of pleading and procedure, we have substantially the practice which prevailed in the time of Justinian, and which lies at the basis of admiralty and equity practice and at the basis of what is called the reformed code procedure in the United States. But in the matters of criminal law, of the law merchant, and the general rules of evidence, we resemble the other states of the Union.

Coming now to those parts of the Americas which have derived their legal systems from Spain, we may recur to the evolution of law in the Spanish peninsula, and inquire how Roman and civil law have come to Mexico, Central America, and South America, and especially to our new possessions. We need not dwell on the early career of the Greek, Phœnician, and Carthaginian colonies in the Spanish peninsula. We may begin with the time of Augustus, when Spain was highly organized under the Roman system of municipalities and enjoying for a long time what was called the

Roman peace. The country became highly civilized, and distinguished men, like Trajan and Martial, were natives of the province. The law was that of the classical period of Rome, as modified by the local situation. It was the law of Gaius, of Ulpian, of Papinian, applied and extended by imperial constitutions or decrees.

In the fourth century of our era a great change took place, which has left its impress, as we have seen, upon the juristic life and thought of both France and Spain, and has in that way influenced the legal history of both French and Spanish colonies. The Visigoths, or West Goths, came, after the fashion of the time, partly as invaders and partly as immigrants, who cherished in their rude way admiration and allegiance to the Roman Empire. They obtained possession of the southern part of Gaul and a large portion at least of the Spanish peninsula. In the fifth century the Visigothic kingdom became practically independent of Rome.

Under Euric and Alaric II., in the beginning of the sixth century, the codification was prepared, known sometimes as the Breviary of Alaric II., to which reference has already been made, a compilation of much importance as a matter of fundamental legal history. It antedated by some years the works of Justinian, and in this respect alone possesses considerable interest. Furthermore, it was prepared in pursuance of the principle of personal laws for the use of Roman subjects of this west Gothic kingdom. It contained sixteen books of the Theodosian Code, a collection of imperial Novells or new imperial constitutions of more recent date; the Institutes of Gaius compressed into two books and sometimes called the Gothic Epitome of Gaius; some *sententiæ* or opinions of Paul; some portions of the Gregorian and Hermogenian codes, and finally one passage from the writings of Papinian. In this way, amid the many chances and changes of this turbulent epoch, many of the best portions of the classical law of Rome were preserved, and the Breviary of Alaric II. became Roman law for Western Europe, at least until the revival of the legal studies in the twelfth century, when, as Professor Sohm has remarked, this *corpus juris* of the German king was destroyed by the *corpus juris* of the emperor of Byzantium.

In the seventh century the Spanish code known as the *Fuero Juzgo* was promulgated. The name is significant as indicating perhaps the formation of the Spanish language. It is a contraction of *Fuero de los Jueces*, which in turn is a modification of the words *forum judicum*. We might translate *Fuero Juzgo*, there-

fore, as a guide or code for the judges; or, to use more general terms, as a system of jurisprudence. Opinions differ very widely as to the merits of this work, but it certainly presents an interesting amalgamation of Roman law with Gothic or Teutonic customs.

Passing over some other compilations, we find it probable that the juris-consults of Spain in the twelfth and thirteenth centuries began to take part in the general revival of legal studies and of the works of Justinian which had become so extensive in Italy, France, and England. In the year 1255 Alphonso the Learned, the king of Castile and Leon, promulgated the *Fuero Real*, a treatise upon law, which may be considered to bear the same relation to the legal system of Spain at that time that the Institutes of Justinian bore to his Digest. This work was really preparatory to the framing and promulgation of the *Siete Partidas*, one of the most important and interesting codes that has ever been published in the course of legal development. This work was finally promulgated in the year 1348, in the reign of Alphonso II. It is divided into seven parts, as its name implies, this division possibly being an imitation of the seven parts of the Digest of Justinian, and having perhaps some reference to the supposed sacred character of that number. The *Partidas* are still worthy of careful study, since they are fundamental in the law of Spain and her colonies. When the French colony, known as Louisiana, was ceded to Spain in 1760, the code known as the *Partidas* was introduced and became really a large part of the fundamental law of the vast domain. Portions of it were translated into French for the benefit of the inhabitants. Some of its provisions remained as a part of the law of the State of Louisiana, and are referred to in the earlier decisions of her Supreme Court.<sup>1</sup> A translation of the principal portions of the work into English was made by Messrs. Moreau-Lislet and Carleton, and published in 1820, with an introduction giving an account of Spanish law as then existing.

We may mention in passing a code called the *Nueva Recopilacion*, promulgated in the time of Philip II., and the *Novissima Recopilacion*, adopted in 1805, in the reign of Charles IV. Nor should the celebrated code of maritime laws, called by the Spanish *El Consulado*, and generally referred to in our law books as the *Consolato del Mare*, be forgotten. This remarkable compilation made by order of the magistrates of Barcelona in the thirteenth

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<sup>1</sup> Beard v. Poydras, 4 Martin 348.

century, is really fundamental in commercial and nautical affairs, and has obtained a great authority in the modern civilized world by its intrinsic merits.

We may also merely notice in passing the Code of Commerce, adopted in Spain in 1829, and may then pass on to much more recent codifications which are to-day the fundamental law of what we call our new possessions.

It is understood that as early as 1850 there were persistent efforts made in Spain to revise and codify her laws, but the final adoption of such codes was greatly delayed by the fact that in the various provinces the local *fueros*, charters, and customs were highly esteemed and jealously guarded. There was not the opportunity to sweep them away that was found in France with her revolution and her consulate, and the new codes were only finally adopted after a long delay and with a large reservation of local rights and customs. These reservations, however, would not, I suppose, affect their force in the colonies; and so far as our new possessions are concerned, I assume that the provisions of these codes are generally obligatory as private law in civil matters, so far as they have not been recently modified by authority of the United States.

Taking up these modern codes, their consideration may be arranged in chronological order as follows: The Code of Procedure of 1881, the Code of Commerce of 1886, the Civil Code of Law of 1889, and the Hypothecary Code, concerning mortgages, privileges, and their inscription, extended to the islands in 1893.

The Code of Procedure of 1881, which is in force in our new possessions, represents the Roman practice under the later empire, and is in theory the method of procedure which underlies admiralty and equity practice, and what we call the reformed code of procedure of the present day. It falls into two general divisions,—one concerning the “contentious jurisdiction,” where parties are suing each other contradictorily, and the other concerning the “voluntary jurisdiction,” where a party goes into court, generally in an *ex parte* way, as, for example, to open a succession, to probate a will, or to appoint a tutor. The pleadings follow the theory of the time of Justinian, and may be substantially stated as a petition by plaintiff and an exception or answer by defendant.

The Code of Commerce of 1886, which likewise prevails in our new possessions, contains four books: the first treating of commerce and commercial people in general; the second concerning



contracts which are especially commercial in their character, including mercantile companies, banks, and railways; the third treating of maritime commerce and the law of shipping; and the fourth making provisions in regard to respites and insolvencies, and prescription or limitations in commercial matters.

The Civil Code of 1889, which is, of course, a code of private law, is an interesting and important work. It is understood that Mr. Alonzo Martinez, one of the most distinguished of Spanish jurists, was one of its compilers. Its general plan is not unlike that of the Code Napoleon and other European codes of a similar character, as well as the civil codes of Lower Canada, Louisiana, and Mexico. It follows the division suggested by Gaius in the second century when he declares that all jurisprudence concerns persons, things, and actions. The subject of actions or the remedies by which persons may vindicate their rights to things is left to the Code of Procedure; and in general terms the Civil Code, therefore, treats of persons who may acquire rights in things or property; of things or property in which such rights may be acquired, and finally of obligations by the effect of which the property in things is often acquired or lost.

This Civil Code likewise contains four books. The preliminary title treats of laws and their effect and application. The first book contains twelve titles treating of the law of persons, whether as citizens or foreigners, as natural or juridical, as present or absent; with detailed provisions in regard to the relations of husband and wife, parent and child, tutor and minor, and general rules in regard to civil status and its proof.

The second book is divided into eight titles, and treats of things; that is to say, of property, ownership, and its modifications. It considers the subject of property as either immovable or movable; as public or private; as subject to ownership, either perfect or imperfect, and to the right of eminent domain, and lays down the rules in regard to its acquisition by accession, by possession, and by invention; and concludes with a statement of the law in regard to servitudes, whether personal in their character, as usufruct, use and habitation, or real servitudes or easements springing from the legal or conventional relation of different estates to each other. Rules are also given relating to the recording of documents which concern immovable property and real rights.

The third book, containing eighteen titles, treats of obligations, and is an interesting treatise upon that important subject, as it

presents itself to the mind of the jurist in the latter part of the nineteenth century. It declares that every obligation consists in giving, doing, or not doing something, and it recognizes that all legal obligations arise either from contract, from quasi-contract, from offense or active tort, from quasi-offense or negligence, and finally in some cases from an arbitrary provision of law. The different kinds of obligations are discussed, whether conditional or unconditional, divisible or indivisible, several, conjoint or solidary. It then takes up the subject of the extinction of obligations, and states that they may be extinguished by payment or fulfillment, by the loss of the thing due in certain cases, by the voluntary remission of the debt, by compensation or what we might call set-off, and by novation. It next proceeds to treat of the subject of contracts as one of the principal sources of obligations; the validity of contracts, the consent of the contracting parties, the object of contracts and their cause, their interpretation, rescission and nullity. The writers then discuss specific contracts, as those of marriage and dowry, and the community of goods existing between husband and wife, and then the contracts of sale, exchange, letting and hiring, rent and emphyteusis, partnership, mandate, loan, deposit, aleatory contracts such as insurance, compromise or transaction, suretyship, pledge, and hypothecation.

The writers then proceed to lay down the rules in regard to obligations arising in the absence of agreement: first, from quasi-contracts, in which obligations arise from certain lawful acts in the absence of an agreement; and secondly, from offenses or quasi-offenses where obligations arise from unlawful acts, whether of active wrong or passive negligence.

The remainder of the work is devoted to dispositions in regard to insolvency and the classification of debtors and creditors with regard to their rights, privileges, and preferences; and finally to the subject of prescription, or lapse of time, by which property and rights may be acquired, and by which rights of action are barred.

The style of the work is very concise and accurate. Mr. Levé, a French judge, writing in 1890, declares it to be a more scientific book than the Code Napoleon. Of course its compilers had the advantage of about a hundred years of discussion and commentary in Continental Europe on these subjects, to say nothing of similar work that had been done in the three Americas.

There is a supplemental provision of this Spanish code of 1889

which appears to be interesting and important, and which reads as follows :

“ 1. The president of the Supreme Court, and the presidents of the tribunals of appeal, will send to the minister of justice at the end of each year a report of the matters which have been submitted to them in civil cases ; and they will point out the defects and difficulties which the application of this code may have revealed to them. They will indicate with detail the controverted questions and points of law as well as the articles or omissions of this code which have caused doubt to spring up in the courts.

“ 2. The minister of justice will transmit these reports and a copy of the civil statistics of the same year to the general commission of codification.

“ 3. After having taken cognizance of these documents, and of the progress realized in other countries which may be taken advantage of in our own, and of the jurisprudence of the Supreme Court, the commission of codification will formulate and address to the government every ten years a plan of such reforms as it may think proper to prepare.”

We need not dwell upon the Code of Hypothecary Law, which appears to have been enacted in Spain in 1871, and extended to the islands in 1893. It contains an elaborate codification of the law in regard to mortgages of different kinds, whether conventional or legal, and the method of recording them in such a way as to notify third persons of their existence.

After this statement in regard to the history of Spanish law and of its extension to the islands which we now include as objects either of our ownership or protection, it would seem useful to inquire in the interest of legal science as to the future of jurisprudence in Porto Rico, Cuba, and the Philippines. It would seem that the example of the Louisiana purchase of 1803, as already detailed, might throw some light upon this interesting subject. For more than thirty years before that purchase, the vast domain called Louisiana had been a Spanish colony. It is true that in the early history of the French settlement, the laws and ordinances of France and the Custom of Paris had been extended to it, but the difference between the law of France and the law of Spain when applied to colonial conditions was not great enough to make any special solution of continuity. The net result was that when we acquired the Louisiana purchase in 1803, its laws and jurisprudence were quite similar to those that now prevail in Porto Rico, Cuba, and the Philippines ; and the question naturally arose as to what should be done. It was considered, as we have seen, that no state carved out of this purchase should ever be admitted to the Union with a Spanish

system of jurisprudence in criminal matters. But the Territory of Orleans had a considerable population who had been living for about a century under a system of private law in civil matters derived from France and Spain. The government of the United States acted very wisely in not undertaking to change what had thus become interwoven with the social life and proprietary rights of the people. It was only in criminal matters that by the legislation of 1805 the common law of England was adopted as a basis of definition and practice. The law in civil matters remained unchanged and was left to its natural development.

It is submitted that a similar course should be followed with reference to Porto Rico and the Philippines as well as with reference to Cuba, if we are to have anything to say in regard to that "Pearl of the Antilles." It is quite likely that some modification ought to be made in regard to the definition of crimes and offenses and the method of criminal procedure, but so far as private law in civil matters is concerned, there is no better system on the face of the earth than that which is represented by the Spanish codes I have attempted to describe.

No doubt in past years, in the administration of justice in these islands, there has been a good deal of malfeasance. But such malfeasance should not distract our attention from the scientific value of these codes. The best law may be badly administered, and may thus become an engine of abuse, but when we have good laws honestly and intelligently administered, then we have an ideal condition of jurisprudence. Let us hope, then, that no effort will be made to disturb the general system of law in our new possessions so far as it concerns civil matters.

As for Mexico, Central America, and South America, it may be stated, in a general way, that they have all derived their systems of law and jurisprudence from Spain during the colonial period, so that Spanish law of the sixteenth, seventeenth, and eighteenth centuries, as applied to colonial conditions, is fundamental in those countries. We may take Mexico as a type. Conquered by Cortez in 1521, the first Spanish viceroy was appointed in 1535, and from that time until Mexico achieved her independence in the early part of the nineteenth century, the law of Spain was there gradually developed and applied, under such local regulations and decrees as were promulgated through the Council of the Indies. At present, Mexico is a federal republic, resembling our own country in its combination of national and state governments. As

I understand, it consists of a Federal District, which may be likened in some respects to our District of Columbia, — of twenty-seven states and one territory, called Lower California. A civil code was adopted by the federal authority in 1871. It could extend by its own force only to the Federal District and to Lower California; but it was a work of such manifest merit that it was adopted by almost all the states — I believe by twenty-five out of twenty-seven — so that uniformity of jurisprudence was largely secured. It was amended in 1884, and, as amended, constitutes an important and scientific body of law, resembling the modern civil codes of other countries in its principles, with some provisions, of course, of local character. Generally speaking, it may be said that it treats of the law of persons, their domicile and status, of artificial or legal persons, of property and its various modifications, and of obligations.

We need not dwell on further details in regard to Central America and South America, and must leave that part of the subject with the remark, simply, that Roman and civil law, as handed down by Spain, may be considered as fundamental in those countries.

It would seem that students of law in our country may well begin to acquaint themselves with the elements, at least, of this legal system, which, as we have seen, prevails in so many regions of the western hemisphere, and in the thousand islands we have acquired in the East. The task is not so difficult as it may seem. Assuming that the student has a fair knowledge of the leading principles of Roman law, and comprehends the meaning of its technical terms, which appear sometimes alien and mystical, he may read the codes of France, Canada, Louisiana, and Spain with interest and understanding. And he will find that, after all, the difference between the civil law and the common law is by no means so great as some persons imagine. About a year ago in reply to some questions by Professor Maitland, submitted to me by our lamented friend Professor Thayer, I tried to express this idea in these words: —

“If you eliminate from the English law the peculiarities of the tenure and transmission of real estate which are largely feudal or social in origin; if you further eliminate, as they are doing in England, the technicalities of common law pleading; if you leave out some rules of evidence, which, as you well know, have grown

up around the practice before the English common jury, — the rest of English common law will be found not to differ very much from the civil law in those elementary principles which are essential to the administration of justice between man and man. There are differences of terminology, which, to some, seem strange and alien, but when they are once understood, the leading doctrines are found to be much the same. And to me it is very interesting to notice how the English judges continually fall back on the Roman and civil law as a ground of refuge in time of mental perplexity. You will doubtless recall the case of *Berchervaise v. Lewis*, L. R. 7 Common Pleas, where neither counsel nor court could find any English precedent in point, and the decision was finally made on the authority of a text from the Pandects. We might inquire why the court should cite the Pandects unless in some perhaps sub-conscious way the doctrines of the classical jurists underlie even English law."

*William Wirt Howe.*

NEW ORLEANS.



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AMENDMENTS TO THE BANKRUPTCY ACT. — The Bankruptcy Act of 1898 was probably more favorable to an insolvent debtor than any other bankruptcy law ever enacted. Any debtor, except a corporation, could become a voluntary bankrupt and gain the privileges of the Act if he wished; but if he did not wish to become a bankrupt the acts of bankruptcy rendering him liable to be adjudicated a bankrupt on petition of his creditors were few. Moreover, the causes for opposing the discharge of a bankrupt were narrowly limited, and in practice the proportion of bankrupts who have failed to get a discharge must be very small. In the main the law has worked successfully, but some provisions have been found ambiguous, and others have been thought unjust to creditors. The amendatory act which has just become a law for all cases not already pending is an attempt to remedy some of these defects. The amendments, unlike the original act, seem to have been drawn by the hands of creditors and court officials rather than by those to whom the interests of the debtor are of paramount concern. The fees of both the referee and the trustee are increased, and a number of changes are made in the interest of creditors. Probably the most important of these is the amendment of section 57. Hereafter a creditor who has received a preference innocently may prove other claims without surrendering his preference. A new act of bankruptcy is created and mining corporations are made subject to involuntary bankruptcy. Four new objections to the discharge are added to the two created by the Act of 1898, and one of the two specified in the original act is made more stringent. The debts not affected by a discharge are also slightly increased in number. The wife of a bankrupt may be compelled to give testimony in regard to transactions to

which she was a party. The jurisdiction of the bankruptcy court is enlarged by the addition to section 23 *b*, of a proviso which permits suits for the recovery of property under sections 60 *b* and 67 *c* to be brought in that court.

A few amendments, but not so many as might be wished, have for their object rather to make clear ambiguities in the original act than to make a change in the law. This is apparently the primary object in the amendment to section 17, which specifies what debts are not affected by a discharge. Another question on which there are conflicting decisions is settled by the provision that where a preference consists in a transfer, the period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

It is provided that the bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any liability under the laws of a state or territory or of the United States. This is presumably meant to overrule such cases as *Train v. Marshall Paper Co.*, 180 Mass. 513. It may well be questioned whether the intention has been effectuated. Congress cannot change the conditions of a director's liability in Massachusetts or any state, and if the state law requires as a condition of charging a director that not only shall judgment be given against the corporation, but that execution shall issue and be returned unsatisfied, these conditions must be fulfilled, and if the corporation is discharged it seems impossible to fulfill them. For precisely such a reason in Massachusetts while the Act of 1867 was in force sureties on attachment bonds were held to be discharged by the discharge of the principal debtor, though the bankruptcy law provided that sureties should not be discharged. A state statute had to be passed to remedy the injustice. See *Hill v. Harding*, 130 U. S. 699. The difficulty might easily have been met by denying a bankrupt corporation a discharge. The present act is the first to allow a corporation a discharge, and there is little to be said in favor of the innovation.

A definite provision allowing proof of contingent claims should also have found a place in the amendatory act.

The amendments as a whole improve the law. They strengthen the hand of the creditor, but an honest debtor is not materially affected by them.

S. W.

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**RIGHTS OF SPECIAL TAX-PAYERS IN LOCAL IMPROVEMENT CONTRACTS.** — A question of apparently first impression has recently been raised in the Kentucky courts, involving a determination of the relation of a city to its inhabitants with respect to contracts for local improvements. The city of Louisville let out a paving contract upon which there was a reliable surety. On the contractor's becoming embarrassed the city released both him and his surety, and relet the contract at a great increase in expense. The abutting owners, who had been specially assessed for the cost under the first contract, successfully sued the city for repayment of the extra assessments levied to meet the additional cost under the second contract. *Barfield v. Gleason*, 63 S. W. Rep. 964; *Louisville v. Kentucky, etc., Bridge Co.*, 70 *ibid.* 627. The obvious result of the cases is to shift the burden caused by the improper action of the council from those specially assessed to the general tax-payers.

That a city does not hold such contracts strictly in trust for the special class to be benefited is shown by the fact that though the abutting owners have a right of action if the city permits defective construction, yet if the work has been completed and payment made the right of action is gone. *Schumm v. Seymour*, 24 N. J. Eq. 143; *Liebstein v. Mayor*, *ibid.* 200. It seems clear that the Kentucky court too was of this opinion, as it held that the cause of action accrued, not when the surety was released, but when the extra assessment was paid. The city furthermore cannot justly be said to be an agent, because the so-called principals have no control in the matter. Yet undoubtedly a fiduciary relationship of some sort does exist, as is indicated by the fact that a city, by way of mere gift, cannot release a debtor to the detriment of any tax-payer. *Wells v. Putnam*, 169 Mass. 226; see 16 HARV. L. REV. 211. The court considered that the city was exercising a "statutory power of attorney"; but it is a little odd to find the power granted by the attorney and not by the principal.

Technically the case may be worked out thus. At the outset the council has full legislative discretion to determine whether an improvement is advisable. But when that discretion has been exercised and the contracts have been made, a duty, ministerial in its nature, arises to have the betterment properly executed. If the cost is fraudulently increased the abutters need pay only the fair value of the work done. *Matter of Livingston*, 121 N. Y. 94. The same is true in the case of gross negligence. *Matter of Anderson*, 109 N. Y. 554. In the principal case to release the solvent surety was not a legislative or discretionary act, because the council made no pretence of determining that the paving should be abandoned altogether. It was in fact a ministerial tort causing damage to the abutters; and the latter should recover under the general rule of liability for torts committed by municipal agents in the execution of ministerial duties. See 2 DILL MUN. CORP., § 980.

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**NATURE OF INSURANCE CONTRACTS.** — A policy insuring property is generally asserted to be a contract for the personal indemnity of the insured. See 1 MAY, INS., § 6. There is a tendency, however, to depart from this proposition, and an illustration of it may be seen in a recent South Carolina case. Property had been insured by a grantee under a voluntary conveyance which later at the suit of the grantor's creditors was declared fraudulent. After a loss all the parties appeared before the court and the proceeds of the policy, in amount equalling the actual damage to the property, were given to the grantee under the fraudulent conveyance. *Steinmeyer v. Steinmeyer*, 42 S. E. Rep. 184. The court professed to base its decision on the general principle, reasoning that the creditors could not reach the proceeds since they resulted from the personal contract for indemnity between the company and the grantee. Cf. *Forrester v. Gill*, 11 Col. App. 410; *Bernheim v. Beer*, 56 Miss. 149. But in emphasizing the personal nature of the insurance contract the court slighted the other essential characteristic, indemnity. Only by a fiction can the damage to the grantee be regarded as more than nominal, and hence in allowing him substantial damages the decision clearly departs from the rule which it professedly adopts.

The departure in other classes of cases takes a contrary direction, and disregards the personal element for the sake of indemnifying the actual sufferer. Where a grantee of a conveyance constructively fraudulent as against the

grantor had insured, it was held that the proceeds of the policy should go to the defrauded grantor, since he in equity was entitled to the property. *Bath, etc., Paper Co. v. Langley*, 23 S. C. 129. Again, in cases where a loss occurs on land which is the subject of an executory contract of sale, the prevailing view in America is that the vendee is entitled to the proceeds of a policy procured by the vendor. *Skinner, etc., Co. v. Houghton*, 92 Md. 68; *contra, King v. Preston*, 11 La. Ann. 95. In both of these instances a contractual relation is lacking between the company and the party ultimately receiving the proceeds.

The disinclination of the courts to relieve insurance companies from liability through a seeming technicality doubtless explains why the integrity of the general rule is not preserved; and where the proceeds are given to the person actually damaged substantial justice seems often attained. Since the company's liability, however, must be found in its contract, this desirable result can be reached only by adopting a broad though somewhat forced rule of construction, that *prima facie* the company contracts to indemnify not only the person taking out the policy but any other party beneficially interested at the time of loss. The view of the principal case, on the other hand, appears insupportable on any ground. It violates the terms of the policy by giving damages to one not damaged in a case where that result is not justified by reasons of substantial justice.

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DE FACTO CORPORATIONS. — A state of facts which tests current definitions of *de facto* corporations was recently presented to the South Dakota courts. An attempt had been made to organize a banking corporation at a time when there was no statute authorizing it. Later the necessary statute was passed, but the bank, which had meanwhile held itself out as incorporated, took no steps to comply with the law. In actions involving the question of the bank's status the court, while denying the existence of any estoppel, rested its decisions on the ground that the bank was a *de facto* corporation. *State v. Stevens*, 92 N. W. Rep. 420, and *Mason v. Stevens*, *ibid.* 424.

The doctrine of *de facto* corporations is often said to be founded on estoppel. *Snyder v. Studebaker*, 19 Ind. 462. But it covers cases where there can be no estoppel, and is to be rested most satisfactorily on grounds of public convenience and business necessity. See *Society Perun v. Cleveland*, 43 Oh. St. 481; 36 Am. L. Reg. N. S. 18, 21. These reasons, however, apply with greater or less force in every case of pretended incorporation, and it is obviously necessary to restrain the unauthorized assumption of corporate powers by requiring more than proof of mere user before recognizing corporate existence *de facto*. The principle that the state is the sole source of corporate power is fundamental. The existence of a law under which the corporation might be created is therefore essential, for otherwise the claim of corporate existence is not only entirely unauthorized, but is against the implied prohibition of the state. Certain frequently quoted definitions have included only those two elements — the user of assumed corporate powers, and the statute. See *Methodist Church v. Pickett*, 19 N. Y. 482. The better decisions, however, require, as a third element, a *bona fide* attempt to organize under the statute. See *Finnegan v. Noerenberg*, 52 Minn. 239; *McLennan v. Hopkins*, 2 Kan. App. 260, 265. The principal case fulfills

the two former conditions, but partly fails as to the third. Whether the fact that the attempt to organize was not under the law, but previous to it, should prove fatal must depend on the reasons underlying the requirement. The courts in adopting this test have done more than lay down a convenient and expedient rule of restriction; they have emphasized the necessity of a recognition of the state's will, and an honest and reasonable effort to comply with it. How nearly exact this compliance must be is a question of degree, but it would seem that it should at all events have direct reference to the enabling law. It is true that in the principal case there had been a *bona fide* and public attempt to organize, but that attempt had been of no avail prior to the passage of the statute, and its effect cannot well be carried over. There was no attempt to comply with the statute; no attempt that might have resulted in the formation of a corporation *de jure*. There was a *quasi* recognition of the state as the source of corporate power, but no recognition of its authority to prescribe the mode of incorporation. On the whole, therefore, assuming as the court does that there was no estoppel, the decisions would seem to be incorrect. The bank has even less claim to *de facto* corporate existence than have those associations whose honest but seriously defective attempts to organize in compliance with statutes have been held to fail. *McLennan v. Hopkins, supra*.

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**RIGHT TO WITHDRAW FROM PUBLIC SERVICE.** — That individuals or corporations engaged in callings of a *quasi*-public nature are, so long as they remain in the business, *ipso facto* subject to special duties to the public, is settled beyond dispute. These obligations may, moreover, be extended by judicial decision, without the aid of statute, to callings never before so regulated. *Nash v. Page*, 80 Ky. 539; see 15 HARV. L. REV. 309. The question whether the courts may take a further step and hold that the obligation of a public service company, independent of any express provision by its franchise, includes the duty of continuing business so long as, in the opinion of the court, the public need requires it, is suggested by a late case in a circuit court of Indiana. *City of Indianapolis v. Indianapolis Gas Co.*, 35 Chicago Leg. News, 165. The defendant corporation had for many years supplied Indianapolis with natural gas, acting under a city franchise which gave it the special privilege of laying its mains in the streets, and contained no provision restraining the defendant from abandoning the business at any time. Notice was given by the defendant that on a certain date it would cease to supply gas and would give up its use of the streets. At suit of the city a temporary injunction issued to prevent such action pending final decision.

The view of the court seems based upon a supposed public right that a business which supplies a definite public need shall not be terminated at the caprice of individuals or corporations. In the case of public service companies not acting under franchise, the recognition of this right would mean that an obligation not to withdraw from business if such withdrawal would seriously inconvenience the public, is part of the duty incidental to public service as such. Such a doctrine, even if declared by statute, might well be held violative of the Fourteenth Amendment of the Federal Constitution, as an unwarrantable deprivation of business liberty. See *State v. Goodwill*, 33 W. Va. 179, 181, 183. BRANNON, FOURTEENTH AMENDMENT, 109 *et seq.*



The case of a company acting under franchise presents somewhat greater difficulties, particularly if special privileges, such as the right of eminent domain or the right to occupy the streets of a city, are conferred. It has been argued that such a contract of enfranchisement contains a term, implied from the nature of the case and assented to on the part of the company by acceptance of the franchise, that service shall continue so long as the public may require it. Some *dicta* in the cases seem to support such a position. See *People v. Albany, etc., R. R. Co.*, 24 N. Y. 261, 269; *State v. Sioux City, etc., R. R. Co.*, 7 Neb. 357, 374. Moreover the few cases which have been found actually deciding that a public service company may withdraw, are not necessarily inconsistent with this view. In all of them it appeared that continuance in business would involve actual financial loss. *Commonwealth v. Fitchburg R. R. Co.*, 12 Gray (Mass.) 180; *State v. Dodge City, etc., Ry. Co.*, 53 Kan. 329. The decisions might, therefore, be supported on the ground that the public policy which underlies the obligation to remain in service does not require the maintenance of a losing business. In spite of these cases, however, it seems to have been generally supposed that public service companies of either class may withdraw from business at will. See *Savannah, etc., Co. v. Shuman*, 91 Ga. 400, 402. It might well be required, in the case of an enfranchised company at least, that reasonable notice of withdrawal be given in order that provision might be made for the changed conditions. But if it be desirable that the acceptance of certain privileges should carry with it a correlative duty to render service indefinitely, it would seem that the doctrine should be established by statute rather than by so free a judicial interpretation of the franchise as that adopted in the principal case.

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RIGHT OF SET-OFF AS APPLIED TO STOCKHOLDERS' LIABILITY. — Whether or no a stockholder who has been sued upon his statutory liability for the debts of a corporation may plead in discharge a claim of his own against the corporation is, in the absence of express statutory provision, an unsettled question. When the right to enforce such liability is vested in the receiver of the corporation or in the creditors as a body, it is almost universally held that the stockholder must pay in full and prove his claim with the other creditors. *Matter of Empire City Bank*, 18 N. Y. 199; see COOKE, CORP., § 225. If, on the other hand, the statute allows the individual creditor to sue, the stockholder may, by the weight of authority, set off the amount due him from the corporation. *Garrison v. Howe*, 17 N. Y. 458; *contra, Lauraglen Mills v. Ruff*, 57 S. C. 53; see TAYLOR, CORP., 5th ed., § 732. Two cases in Maryland, decided within a year, adopt the latter rule and allow the stockholder a set-off in an action by a creditor. *Cahill v. Association*, 94 Md. 353; *Strauss v. Denny*, 53 Atl. Rep. 571.

The rule of the first class of cases where the action is for the benefit of all the creditors seems clearly just. A contrary result, allowing a set-off, would give the stockholder a preference, whenever the property of the corporation together with the sum for which the stockholders are liable proves insufficient to satisfy the creditors. It is true that in bankruptcy a creditor is allowed at common law to set off a debt due the bankrupt. *Ex parte Wagstaff*, 13 Ves. 65. The bankruptcy rule is distinguishable, however, on



the ground that the creditor as a matter of business relies upon the set-off as security in making advances to the bankrupt ; while a stockholder can hardly be deemed to have in mind his statutory liability when he deals with the corporation.

Attempts are made upon various grounds to distinguish from the first class of cases the second class, where the individual creditor is allowed to sue. It is said that, since the whole proceeding is in disregard of the rights of other creditors, the stockholder is as much entitled to preference as the creditor who is suing him, *THOMPSON, COM. CORP.*, § 3790 ; or that it cannot be known that creditors will not be paid in full, *Mathez v. Neidig*, 72 N. Y. 100, 104 ; or that scattered stockholders should be protected as much as possible from creditors who may collect their debts several times, *Ball v. Anderson*, 196 Pa. St. 86. These arguments, however, tend rather to impeach the wisdom of the legislature in allowing suit by an individual creditor than to justify a departure from principle in order to lessen the resulting hardship. The cases concede that from lack of mutuality there is not a true set-off and that the defense of the stockholder must be rested upon equitable grounds. *Pierce v. Topeka Security Co.*, 60 Kan. 164. Furthermore in an analogous class of cases where the creditor may sue directly for unpaid subscriptions the stockholder is allowed no such defense. *Thompson v. Reno Savings Bank*, 19 Nev. 103 ; *Bolton Carbon Co. v. Mills*, 78 Ia. 460. On the whole, since the statutory liability is created for the benefit rather of the outside creditors than of the stockholders, it would seem that if either class is to be preferred, it should be the former.

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**THE LAST CHANCE DOCTRINE.** — “ The party who has the last clear opportunity of avoiding the accident notwithstanding the negligence of his opponent is considered solely responsible for it.” The last chance doctrine thus expressed was adopted in a recent Louisiana case. *Barnhill v. Texas & P. R. R. Co.*, 33 So. Rep. 63. Though stated so broadly, its importance as a doctrine is confined to those cases where the last opportunity to avoid the damage lies with the defendant ; for where the negligence of both parties is concurrent, or where the plaintiff has the last chance, recovery is denied by well-established rules of contributory negligence.

The origin of the doctrine is found in the case of *Davies v. Mann*, 10 M. & W. 546. The basis there suggested for it is that, though the plaintiff was negligent, his negligence was no part of the legal cause of his damage, since the defendant had the last chance to avoid the accident. The New Hampshire court stated this position clearly when it said that under such circumstances the defendant's negligence was, in law, the sole cause of the injury. See *Nashua Iron, etc., Co. v. Worcester, etc., R. R.*, 62 N. H. 159, 163. In that case, however, the fact appeared that a third party's property had been damaged by the accident, and that he had been allowed recovery against the plaintiff. This was possible only on the ground that the plaintiff's negligence was a legal cause of the third party's damage. The plaintiff's negligence thus was treated as a legal cause of the third party's damage, though not of his own. Since the facts in the cases were the same and the damage to each was apparently a natural and probable consequence of the plaintiff's negligence, the inconsistency in the court's position is apparent. The last chance doctrine consequently must stand, if at all, as an exception

to the general rule which denies recovery to a plaintiff guilty of contributory negligence.

The bar raised by contributory negligence rests on the policy of making the loss lie on a person who has been instrumental in bringing it upon himself. See 3 HARV. L. REV. 269. *Prima facie* the last chance rule seems to shift the loss to the defendant merely because he happens to be the last wrongdoer. The argument is often made, however, that the negligence of a defendant occurring under the circumstances created by the plaintiff's prior negligence is more serious than that of the plaintiff. But it is hard to see how a higher degree of care could be demanded of the defendant by virtue of the prior negligence unless he had knowledge of it. Cf. THOMP. COM. NEG., § 232. If such knowledge were made essential, the statement of the rule would take its strongest form. Even so it is open to two objections. In the first place, it is based on the discredited theory of comparative negligence, which allows recovery to a negligent plaintiff when the defendant's negligence is "gross," and his own but "ordinary" or "slight." See *Cicero, etc., Ry. v. Menxer*, 160 Ill. 320. And secondly, thus qualified, it would rarely prove of practical value, for if the defendant had the required knowledge his tort generally would amount to an intentional tort to which the rules of contributory negligence have no application. See SPRAGUE, CONTRIB. NEG., 7. The last chance rule as a distinct doctrine accordingly seems to deserve no place in the law.

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#### SALE BY OFFICER OR STOCKHOLDER OF INFLUENCE IN CORPORATION. —

A seemingly lax view of the duty owed by the officers of a corporation to the stockholders and by the stockholders to each other is presented by a late decision in New York. The plaintiff contracted to buy part of the defendants' stock and to use his vote and influence to retain in office the existing board of directors, in consideration of the defendants' promise to procure for the plaintiff the position of cashier of the corporation for five years and to repurchase the stock at a stipulated price should he be sooner discharged. The plaintiff made the purchase and received the appointment, but was discharged before the time expired, and brought an action for the defendants' refusal to repurchase the stock. It was held, two justices dissenting, that the contract was not void as against public policy. *Bonta v. Gridley et al.*, 78 N. Y. Supp. 961 (App. Div. 4th Dept.).

This contract seems objectionable in that both parties gave up, for benefits to themselves as individuals, their independent judgment as stockholders regarding the election of officers, and in that the plaintiff also sold his influence as cashier. The general principle of law is, of course, that persons to whom the interests of others are committed, must act disinterestedly in behalf of the beneficiaries. *Oscanyan v. Arms Co.*, 103 U. S. 261. Officers of a corporation clearly fall within the scope of this principle. *Wardell v. U. P. R. R. Co.*, 103 U. S. 651, 658. Similarly, the community of interest subsisting between stockholders places each in a *quasi*-fiduciary relation to the others, and sound policy requires that each act *bona fide* for the prosperity of the corporation, uninfluenced by promises of personal reward. *Woodruff v. Wentworth*, 133 Mass. 309. Accordingly the principal case seems insupportable, and it is opposed to the weight of authority. *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kan. 265. How far these prin-

ciples operate to restrain *bona fide* combinations among stockholders to influence corporate management where no such collateral inducements are present is an unsettled question. That understandings not having the force of contract may exist among them is undoubted. Most jurisdictions also allow actual contracts — of which voting trusts are the most common example — in which the parties are benefited not directly as individuals, but as stockholders. *Faulds v. Yates*, 57 Ill. 416; see MOR. PRI. CORP., 2d ed., § 477 n; 15 HARV. L. REV. 756.

The court in the principal case suggests that there was no affirmative proof that the contract was made in bad faith or would be inimical to the interests of the corporation. It is submitted, however, that if transactions of the class to which this contract belongs are opposed to public policy, the courts, in a particular case, should not inquire into the wisdom of the ultimate objects sought by such means. Moreover, if such inquiry were allowable, it would seem that the burden of upholding the contract should rest with the party claiming under it. *West v. Camden*, 135 U. S. 507, 514. The court also argues that a plaintiff who has himself performed should not be deprived of his remedy. This position apparently overlooks the fact that, in determining the validity of such contracts, the courts should consider not the equity of the transaction as between the parties, but the protection of corporate interests in general. Since they are illegal transactions, the plaintiff and the defendant are *in pari delicto*, and the law will leave the loss where it falls.

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**SLEEPING-CAR COMPANIES NOT INSURERS OF PASSENGER'S LUGGAGE.** — It has been urged with much force that a sleeping-car is practically an inn, and that therefore the same rules of liability should be applied in both cases. The absolute liability of a common carrier for goods delivered to it, and the similar liability of an innkeeper for all goods of his guest *infra hospitium*, arose in times when the dangers from dishonesty were great. The law, recognizing the peculiar opportunities of such public servants to defraud their patrons, owing to the helpless position of the latter, imposed severe liabilities. *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285; *Morgan v. Ravey*, 6 H. & N. 265. Modern courts have upheld this doctrine, though the reasons on which it is based are to-day hardly so strong. Once granting the doctrine, it seems difficult to exclude from it the case of the sleeping-car, especially since such a conveyance furnishes unusual opportunities for theft and since fault on the part of the company's servants is peculiarly difficult to prove. Theoretically, then, the cases would seem to fall within the rule. Practically, were the company held as an insurer, it would undoubtedly reduce the dangers of theft, with but slight increase of expense to the company.

This question was lately raised in the case of *Pullman, etc., Co. v. Hatch*, 70 S. W. Rep. 771 (Tex., Civ. App.). The court declined to hold the company as an insurer, and decided that it was liable only for loss due to the negligence or to the theft of its employees. This represents the almost uniform law. *Pullman, etc., Co. v. Gavin*, 93 Tenn. 53; *Pullman, etc., Co. v. Smith*, 73 Ill. 360. The same rule has generally been applied to passenger steamboats. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302. Only one case has been found which holds a sleeping-car company to an insurer's liability. *Pullman, etc., Co., v. Lowe*, 28 Neb. 239.

The obvious similarity between the sleeping-car and the day coach has doubtless been a factor in determining the result the cases have reached. The railroad is liable for property lost in its day coaches only if it has been negligent. The reason seems to be that the luggage is never entrusted to the carrier's possession. *Tower v. Utica, etc., R. R. Co.*, 7 Hill (N. Y.) 47. With the introduction of sleeping-cars the railroad was held to the same but to no greater degree of responsibility for property lost in them, and it was not allowed to shift its responsibility when the sleepers were operated by a special company. *Kinsley v. Lake Shore, etc., R. R. Co.*, 125 Mass. 54. The courts have naturally been disinclined to impose a stricter rule of liability upon the sleeping-car company than upon the railroad. A potent factor, however, in the development of these rules is doubtless to be found in the disfavor with which the modern law looks upon absolute liability.

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DEATH IN A COMMON DISASTER. — The rule has been repeatedly laid down that in cases of death by a common disaster no presumption of survivorship exists, and that in the absence of evidence he who has the burden of proving survivorship must fail, because he cannot make out his case. *Wing v. Angrave*, 8 H. L. Cas. 183. The question generally arises when a common disaster befalls devisor and devisee, testator and legatee, or insured and beneficiary under a life insurance policy. It is remarkable that apparently no decided case squarely raises the question whose heir takes the estate when a devisor and his devisee perish together. The early English cases were all confined to personal property; *Wing v. Angrave, supra*, was restricted to that by the court. The only American decision involving realty was concerning land already held in trust, so that the legal title did not pass in any event. *Newell v. Nichols*, 75 N. Y. 78. At first sight it seems that there would be an absolute dead-lock between the heir of the devisor and the heir of the devisee, neither being in possession. The one cannot prove that the devise lapsed; the other cannot show that his ancestor took as devisee. In this dilemma it may be suggested that the land should escheat. But such an undesirable result is not necessary. The difficulty is purely one of evidence — on whom is the burden of going forward with proof — and a close examination of the situation shows that the devisor's heir can make out a *prima facie* case, whereas the devisee's heir cannot. The former need show only that he is heir of a man who died possessing land; the latter must prove a will and show that there was a devisee who was capable of taking. Obviously the burden of bringing forward evidence is on the devisee's heir and consequently he must lose.

In cases of personalty, where the title vests at once in the executor or administrator, the controversy is as to who can force him to convey. Here the next of kin of the deceased legatee cannot show that such legatee ever acquired a vested interest; nor can the residuary legatee show that the legacy lapsed. Thus neither can prevail against the executor, who, therefore, continues to hold the property. But as he cannot hold for himself, a constructive trust arises in favor of the testator's estate, or next of kin. In reaching this conclusion some authorities have held that by a necessary rule of construction the next of kin are favored. See 14 HARV. L. REV. 538. Others state the rule that "for purposes of distribution" both the decedents must be assumed to have perished at the same moment. *Goods*

of *Schwyn*, 3 Hagg. Ecc. 748; *Johnson v. Merithew*, 80 Me. 111. Neither statement seems accurate, though the result reached is sound.

The Supreme Court of the United States has recently arrived at an opposite and original conclusion. A will devised the whole property of the testatrix to her only son, but "in the event of my becoming the survivor . . . of my son" then to a charitable Home. The mother and the son died in a shipwreck; and the property is claimed by the Home, the mother's next of kin, and the son's personal representative. The Court gave the property to the first on the ground that the will showed an intention that the Home should take if the son did not. *The Young, etc., Home v. French*, 23 Sup. Ct. Rep. 184. This is in reality interpreting the above words to mean that "unless my son survives the property shall go to the Home" — a dangerous twisting of the actual provisions of the will. It seems that here the mother's next of kin should have prevailed, as neither of the other claimants could prove the survivorship necessary to his case.

When the contest arises under an insurance policy, the same principles govern. He who has a *prima facie* right to the proceeds of the policy necessarily wins. The courts, however, differ as to who has this right. In Missouri if the insured cannot alter the policy the beneficiary's interest is considered as vested, and his representative prevails; if the policy can be altered, the representative of the insured wins. *U. S. Casualty Co. v. Kacer*, 69 S. W. Rep. 370; *Supreme Council v. Kacer*, *ibid.* 671. The real question should be not whether the policy is revocable or not, but whether the condition that the beneficiary should survive the insured is in form precedent or subsequent. If it is the former, his representative must bring forward evidence of actual survivorship; if the latter, he need not. In theory this distinction is evidently sound. The cases are in conflict. *Fuller v. Linzee*, 135 Mass. 468; *Cowman v. Rogers*, 73 Md. 403.

## RECENT CASES.

**AGENCY — RECOVERY OF PAYMENT INDUCED BY FRAUD OF AGENT — C. O. D. COLLECTION.** — While goods consigned to the plaintiff C. O. D. were in the custom house, the defendant company collected the charges, knowing that the goods were so damaged that, had the plaintiff known their condition, he would not have made the payment. Before demand by the plaintiff, the money had been paid to the consignor. *Held*, that the defendant is liable for money had and received. *Hardy v. American Exp. Co.*, 65 N. E. Rep. 375 (Mass.).

The case brings out clearly the true nature of the undertaking of a carrier to deliver goods consigned C. O. D. Being no part of his duty as a carrier, it is the result of a special contract, express or implied, by which he becomes the agent of the consignor for the collection of his charges. *Cox v. Columbus & W. R. R. Co.*, 91 Ala. 392. In this relationship the carrier is consequently subject to the ordinary rules of agency. Where there was no fraud by the carrier, but by the consignor, a recovery was allowed because the money was still in the carrier's hands. *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566. Although in deciding that where the carrier is fraudulent, he is personally liable, the principal case goes a step forward, it seems to be entirely in accord with recognized principles of agency. *Martin v. Morgan*, 3 Moore 635; *Snowdon v. Davis*, 1 Taunt. 359.

**BANKRUPTCY — ACT OF BANKRUPTCY — PROCURING APPOINTMENT OF RECEIVER.** — *Held*, that obtaining the appointment of a receiver in a state court by an insolvent partnership is not an act of bankruptcy. *Re Burrell, Ex parte Varick Bank*,



28 N. Y. L. J. 1381 (Dist. Ct., S. D. N. Y.) For a discussion of the principles involved, see 14 HARV. L. REV. 69.

The recent amendment to the Bankruptcy Act has fortunately changed the law on this point.

**BANKRUPTCY — CONDITIONAL SALE — RIGHTS OF VENDOR AGAINST THE TRUSTEE.** — The defendant had sold chattels on condition that he should retain title till payment. The contract was not recorded. A statute (Comp. St. c. 32, § 14) provides that every chattel mortgage not accompanied by delivery or recorded shall be void as against the creditors of the mortgagor. The vendee without making payment filed a voluntary petition in bankruptcy, and the vendor then replevied the goods. *Held*, that the trustee in bankruptcy can recover them. *Logan v. Nebraska Moline Plow Co.*, 92 N. W. Rep. 129 (Neb.).

A conditional sale in effect constitutes the seller a mortgagee, and the trustee in bankruptcy will ordinarily take subject to the mortgage. *Ex parte Fitz, Re Rawson*, 2 Lowell 519. The Nebraska statute, however, is held to make such a mortgage voidable as against any creditor of the mortgagor, using a process of court to collect his claim. See *Bank v. Anthony*, 39 Neb. 343. A trustee in bankruptcy, engaged in a legal process as the representative of all the creditors, seems to come within this rule, just as he stands in the position of a judgment creditor, and not of the bankrupt, in setting aside a fraudulent conveyance. See *Southard v. Benner*, 72 N. Y. 424. The National Bankruptcy Act, § 67 *a*, provides that "claims which for want of record are not valid against creditors, shall not be valid against the bankrupt estate." This would seem to apply expressly to the principal case. The holding is supported by a decision of the Circuit Court of Appeals. *In re Pekin Plow Co.*, 112 Fed. Rep. 308; *contra*, *In re N. Y. Economical Printing Co.*, 110 Fed. Rep. 514.

**BANKRUPTCY — LIENS — JUDGMENT WITHIN FOUR MONTHS.** — The plaintiff brought a judgment creditor's action to have certain conveyances set aside as fraudulent, and thus obtained an equitable lien more than four months before defendant's bankruptcy. Judgment in this action was recovered less than four months before bankruptcy. *Held*, that the judgment is not invalidated. *Metcalf Bros. & Co. v. Barker*, 23 Sup. Ct. Rep. 67.

In this case the United States Supreme Court has passed for the first time on a question about which the lower federal courts have been in conflict. It regarded the creditor's bill as creating under the state law a lien before judgment, though it was one subject to be defeated by a possible event of the suit. The Bankruptcy Act, § 67 *f*, provides that "all levies, judgments, attachments, or other liens, obtained . . . within four months . . . shall be deemed null and void," but the court held that the general purpose of this section is only to invalidate liens; and therefore only judgments which create liens are affected by it. This view finds support in the fact that § 63 *a* and § 17 refer to certain other judgments not invalidated by § 67 *f*. The position of the clause in question, under the general head of liens, is strong evidence that the view taken is correct. It has been so held by a majority of previously decided cases. *In re Blair*, 108 Fed. Rep. 524; *In re Beaver Coal Co.*, 113 Fed. Rep. 889; *contra*, *In re Lesser*, 109 Fed. Rep. 201.

**BANKRUPTCY — PREFERENCES — FOUR MONTHS' LIMITATION.** — A mortgage was given in May, 1900, but not recorded until April, 1901. Creditors of the mortgagor filed a petition in bankruptcy May 9, 1901, and the adjudication followed June 10th. On June 4th the mortgage was paid from the mortgagor's assets, the debt secured being less than the value of the mortgaged property. *Held*, that the payment was recoverable as a preference. *Babbitt v. Kelly*, 70 S. W. Rep. 384 (Mo., Ct. App.).

The money here paid would not be a preference unless the mortgage was voidable. See § 60 *a* of the Act. It is provided, § 3 *b*, that a transfer open to record may be treated as an act of bankruptcy within four months from the day it is recorded. This has been construed as determining that such a transfer may be avoided as a preference if it is recorded within four months of the bankruptcy. *In re Klingaman*, 101 Fed. Rep. 691. But in the clauses treating of recoverable preferences no such provision appears. By § 60 *a* it is provided, "a person shall be deemed to have given a preference if . . . he has . . . made a transfer," etc. When a mortgage is signed and delivered it is a good transfer between the parties without record, although it may later be defeated by others. The four months, therefore, should begin to run from that date. The weight of authority so holds. *In re Wright*, 96 Fed. Rep. 187; *Asbury Park Assn. v. Sheperd*, 50 Atl. Rep. 65 (N. J., Ch.). When there are creditors who could have avoided the mortgage, the assignee under § 70 *e* could probably, by asserting



their rights, recover the money as a preference. The recent amendment to the Act, changing § 67 *a*, provides that the date of record determines the time when the preference is given.

**BANKRUPTCY — PREFERENCES — TRANSFER FOR PRESENT AND PAST CONSIDERATION.** — An insolvent debtor, with intent to give a preference, transferred his business to a creditor in consideration of a past debt of \$400 and cash payment of \$600. The creditor knew facts which should have put him on inquiry, which would have revealed the fraud. *Held*, that the assignee in bankruptcy can recover the business or its full value, \$1000. *Johnson v. Cohn*, 39 N. Y. Misc. 189. For a discussion of the principles involved, see 13 HARV. L. REV. 409.

**BILLS AND NOTES — FRAUDULENT CONSIDERATION — RENEWAL AS WAIVER OF DEFENSE.** — A payee obtained a note by fraud. Subsequently, and with knowledge of the fraud, the maker signed a renewal note at the request of the payee. *Held*, that the maker may plead the fraud as a defense to the renewal note. *Adams v. Ashman*, 53 Atl. Rep. 375 (Pa.).

Fraudulent consideration renders voidable a note not in the hands of a holder in due course. *Lewis v. Cosgrave*, 2 Taunt. 2. But where the maker retains a benefit under the contract and elects not to repudiate it, he cannot plead the fraud to an action on the note. *Archer v. Bamford*, 3 Stark. 175. Where a note is void, as by a usury statute, the renewal is no better than the original. *Chapman v. Black*, 2 B. & A. 588. This would seem to follow as to a voidable note, unless signing the renewal is a waiver of the defense. In the principal case it did not appear that the maker retained any benefit under the contract, and the renewal was at the request of the payee. A court might well refuse under these circumstances to declare this an election not to repudiate. The maker may have sought merely to postpone an action at a time when it was important to keep his credit unimpaired. Where the original consideration was illegal the same decision has been reached as in the principal case. *Holden v. Cosgrave*, 12 Gray (Mass.) 216.

**BILLS AND NOTES — PRESENTMENT OF CHECKS — CLEARING HOUSE.** — A payee received a check on a local bank after banking hours, and, on the following day, deposited it with his own banking firm for collection through the clearing house. Before the next succeeding business day and the presentment of the check for payment, the drawee became totally insolvent. *Held*, that the failure to present on the day following the receipt releases the drawer from liability. *Edmisten v. Herpolsheimer*, 92 N. W. Rep. 138 (Neb.).

In general, a check must be presented for payment within a reasonable time after its receipt, or the drawer is discharged from liability on it to the extent of the loss caused by the delay in presentment. *Smith v. Janes*, 20 Wend. (N. Y.) 192. It has been commonly held that a reasonable time ends with the close of the business day next following the day of receipt; and within that time the check should be presented, if drawn on a local bank, or mailed for collection, if drawn on a distant bank. *Rickford v. Ridge*, 2 Camp. 537; *Smith v. Janes*, *supra*. But these cases were decided without reference to collection through a clearing house, now an established practice in every large commercial centre. This necessarily delays presentment one day; and since business usage ought to be decisive in fixing a reasonable time, the old interpretation should be relaxed. *Loux v. Fox*, 171 Pa. St. 68; *cf. contra*, *Holmes v. Roe*, 62 Mich. 199. The Negotiable Instruments Law, §§ 186, 193, provides for a reasonable time with regard to the usage of the business, which would seem to allow such an extension of time.

**CARRIERS — RIGHT OF PUBLIC SERVICE COMPANIES TO WITHDRAW FROM BUSINESS.** — The defendant company had for many years supplied the city of Indianapolis with natural gas. It held a franchise from the city, under which it had exercised the right to lay its mains in the streets. The company gave notice that upon a certain date it would cease to supply gas and would abandon its use of the streets. The city sought an injunction to prevent such action. *Held*, that a temporary injunction will issue, pending a final hearing. *City of Indianapolis v. Indianapolis Gas Co.* 35 Chicago Leg. News, 165 (Hamilton Circ. Ct., Ind.). See NOTES, p. 363.

**CARRIERS — SLEEPING-CAR COMPANIES — LIABILITY FOR LOSS OF PASSENGER'S LUGGAGE.** — *Held*, that a sleeping-car company is liable for the loss of a passenger's property only when the loss was due to the negligence or theft of its employees. *Pullman, etc., Co. v. Hatch*, 70 S. W. Rep. 771 (Tex., Civ. App.). See NOTES, p. 367.

**CONFLICT OF LAWS—SIMULTANEOUS CONFLICTING JUDGMENTS IN STATE AND FEDERAL COURTS—CLAIM AGAINST FEDERAL RECEIVER.**—A decree of a federal court in a petition by the bondholders of a railroad for a receivership, placed certain tort claims in a preferential class, provided they should be established as valid demands. The plaintiff had already begun in a state court an action on such a claim. She also filed the same claim, by intervention, in the federal court. Judgments were given on the same day, against the plaintiff in the federal court, and in her favor in the state court. She then filed a second petition for intervention, asking priority for the claim thus established in the state court. *Held*, that her petition will not be granted. *Goodwin v. Atcheson, etc., R. R. Co.*, 118 Fed. Rep. 403 (C. C. A., Eighth Circ.).

Where two conflicting valid judgments are rendered on the same cause of action, by different courts of concurrent jurisdiction, with no common court of appeal, and neither judgment can be shown to have preceded the other, a problem arises, which seems incapable of solution. One party has a legal right to which the other has an equally valid bar. The difficulty results from our system of state and federal courts, and that system provides no solution. The common law apparently furnishes no analogies, and no case in point has been found. The decision in the principal case, however, seems sound, for the decree of priority is merely a direction to the receiver, and vests no absolute rights in a claimant, even when he has proved his claim. See *Louisville, etc., R. R. Co. v. Wilson*, 138 U. S. 501, 506. When a court may refuse priority to any claim, this power may well be exercised against a claim which that court itself has found invalid.

**CONSTITUTIONAL LAW—EMINENT DOMAIN—DAMAGE TO NON-ABUTTING LAND.**—A statute provides that a railroad company shall pay all damages occasioned by laying out its road. Pub. St. Mass., c. 112, § 95. A railroad company in changing the grade of a street at a point not adjacent to the plaintiff's land, which was situated on a *cul-de-sac*, rendered the latter's premises inaccessible to teams for a period of several months. *Held*, that the plaintiff can recover the damages thereby sustained. *Putnam v. Boston & P. R. R. Corp.*, 65 N. E. Rep. 790 (Mass.).

Under such statutory or constitutional provisions, if a public highway is vacated or altered to the detriment of the abutting land, the owner thereof suffers special and peculiar damage for which he can recover. *Parker v. B. & M. R. R. Co.*, 3 Cush. (Mass.) 107; see *Caledonian R. R. Co. v. Walker's Trustees*, L. R. 7 App. Cas. 259. When, however, such a change materially diminishes the value of non-abutting land in the vicinity by rendering access thereto more difficult, Massachusetts and a number of other jurisdictions deny the right to recover damages. *Davis v. Co. Com'rs*, 153 Mass. 218; *Rude v. St. Louis*, 93 Mo. 408. *Contra*, *Rigney v. Chicago*, 102 Ill. 64. The main argument advanced in support of the Massachusetts rule is that the inconvenience to owners of non-abutting land in the vicinity is the same in kind, though not in degree, as that experienced by the general public. See *Smith v. Boston*, 7 Cush. (Mass.) 254. This position seems untenable; for such an owner sustains in addition the loss due to the depreciation in the value of his land. Even according to the Massachusetts test, however, the principal case, which is one of first impression in that jurisdiction, seems rightly decided. The damage suffered by the plaintiff was "special and peculiar," and hence actionable, since access to his land via the public street was entirely prevented. *Brakken v. Minn., etc., R. R. Co.*, 29 Minn. 41; see also *Smith v. Boston, supra*, 257; *Davis v. Co. Com'rs, supra*, 223.

**CONTRACTS—ERRONEOUS OFFER—LIABILITY OF TELEGRAPH COMPANY.**—By an error due to the negligent transmission of a telegraph message the plaintiff was represented as offering oranges at a rate considerably below the market price. The addressee, though believing the message was erroneous, ordered two carloads. The plaintiff supposing his offer had been properly communicated sent the oranges to the addressee. The latter refused to pay a higher price than that stated in the telegram. *Held*, that the plaintiff cannot recover from the telegraph company the difference between the market price and that stated in the telegram. *Germain Fruit Co. v. Western Union Tel. Co.*, 70 Pac. Rep. 658 (Cal.).

Had the addressee without suspecting any error accepted the offer as conveyed to him, such acceptance would, according to the better view, have rendered the plaintiff liable to supply the oranges at the rate stated in the telegram. *Ayer v. Western Union Tel. Co.*, 79 Me. 493; *contra*, *Pepper v. Tel. Co.*, 87 Tenn. 554. In such a case the telegraph company would clearly be liable to the plaintiff for the loss suffered. *Ayer v. Western Union Tel. Co., supra*; *The Western Union Tel. Co. v. Shotton*, 71 Ga. 760. In the principal case, however, since the addressee believed the price quoted was due to error, there was in fact no offer for a contract; and hence no contract was completed by what

purported to be the addressee's acceptance. Consequently the latter was, as the court states, liable for the full value of the oranges ordered by him in bad faith. See *Ayer v. Western Union Tel. Co.*, *supra*, 499. If the plaintiff failed to collect the full amount from him, this was due not to any negligence of the defendant but to the independent wrong of the fraudulent addressee. As, therefore, no damage resulted to the plaintiff from the defendant's negligence, the decision appears sound.

**CONTRACTS — RIGHTS OF BENEFICIARY — SUIT BY MATERIALMEN ON CONTRACTOR'S BOND TO CITY.** — A surety company had given a bond to a city, conditioned on the full performance of a contract by which a contractor agreed to do certain work for the city, and to pay his laborers and materialmen in full. *Held*, that unpaid materialmen are beneficiaries and proper parties to a suit on the bond. *Town of Gastonia v. McEntee-Peterson Co.*, 42 S. E. Rep. 858 (N. C.).

In an action by the contractor, on a contract similar to the above, the city had failed to set up the non-payment by the contractor of claims of materialmen. *Held*, that the latter are not beneficiaries, and are barred from suit in the name of the city against the sureties on the contractor's bond. *City of Lancaster v. Frescoln*, 53 Atl. Rep. 508 (Pa.).

The right of a third party to sue upon a contract, when it is clearly made for his benefit, is recognized in both jurisdictions. *Gorrell v. Water Supply Co.*, 124 N. C. 328; *Merriman v. Moore*, 90 Pa. St. 78. The right of the materialmen to sue would seem therefore to be, in both of the principal cases, solely dependent on whether the clause in question was in fact intended for their benefit. The city's sole motive in inserting such a clause might be to secure efficient workmanship upon its buildings. A sounder view, however, would seem to be that the city wished to protect workmen and materialmen, who are usually its own citizens. Numerous statutes, and more specific provisions in bonds of a similar nature, show that such protection is customary and contemplated. See *City of Phila. v. Stewart*, 195 Pa. St. 309. Accordingly what few authorities there are, exactly in point, seem to support the North Carolina decision. *Lyman v. City of Lincoln*, 38 Neb. 794; *King v. Downey*, 24 Ind. App. 262. Neither case notices the doctrine which excludes sealed contracts from the usual rule. *Harms v. McCormick*, 132 Ill. 104.

**CORPORATIONS — DE FACTO CORPORATION — INCORPORATION ACT SUBSEQUENT TO ATTEMPT TO ORGANIZE.** — An attempt was made to organize a banking corporation at a time when there was no statute authorizing it. Later the necessary statute was passed, but the bank took no steps to comply with the law, though continuing to hold itself out as incorporated. *Held*, that the bank is a *de facto* corporation. *State v. Stevens*, 92 N. W. Rep. 420 (S. Dak.); *Mason v. Stevens*, *ibid.* 424. See NOTES, p. 362.

**CORPORATIONS — DUTY OF OFFICERS AND STOCKHOLDERS — SALE OF INFLUENCE.** — The plaintiff made a contract with the defendants, who were stockholders in a corporation, whereby he agreed to buy part of their stock and to use his influence in the corporation for the re-election of the existing board of directors, in consideration of their promise to procure for him a position as cashier of the corporation for five years, and to repurchase the stock at a fixed price when he should cease to be cashier. After the wrongful discharge of the plaintiff, the defendants refused to buy back his stock, and the plaintiff sued on the contract. *Held*, that the contract is not void as against public policy and that the plaintiff can recover. *Bonta v. Gridley et al.*, 78 N. Y. Supp. 961 (App. Div. 4th Dept.). See NOTES, p. 366.

**CORPORATIONS — STATUTORY LIABILITY OF STOCKHOLDERS — RIGHT TO SET-OFF CLAIM AGAINST CORPORATION.** — The charter of a bank provided that stockholders should be liable for the debts of the bank, to the amount of their shares. In an action by a creditor of the bank the defendant, a stockholder, pleaded by way of set-off a claim against the bank. *Held*, that he may set this off. *Strauss v. Denny*, 53 Atl. Rep. (Md.) 571. See NOTES, p. 364.

**CORPORATIONS — STATUTORY REGISTRATION BY FOREIGN CORPORATION — RECOVERY ON CONTRACT MADE BEFORE REGISTRATION.** — A Pennsylvania statute makes it unlawful for a foreign corporation to do business in the state before registering, and imposes a money penalty for doing so. The plaintiff, a New Jersey corporation, not having registered, built an electric railway for the defendant. It later registered and sued on a *quantum meruit*. *Held*, that the plaintiff cannot recover. *Delaware River, etc., Co. v. Bethlehem, etc., Ry. Co.*, 53 Atl. Rep. 533 (Pa.).

Under similar statutes in some jurisdictions the corporation may have its contracts enforced without registering at all, on the ground that the legislature intended to make the money penalty imposed exclusive of other penalties. *Union, etc., Ins. Co. v. McMillen*, 24 Oh. St. 67; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67. The better view, however, supported by the majority of courts, is that it cannot. *Dudley v. Collier*, 87 Ala. 431; *Cincinnati, etc., Co. v. Rosenthal*, 55 Ill. 85. The ground of the Illinois decision is that the legislature intended, as a means of preventing the prohibited act, that the plaintiff should have no standing in court to enforce a contract arising from it. This construction, however, seems strained in view of the money penalty imposed. See MOR. PRI. CORP. § 665; TAYLOR, CORP. § 401. But the Alabama and Pennsylvania cases go on the broader and more tenable ground that the court will not aid a plaintiff who, to prove his case, must allege his own illegal act. This principle seems especially applicable here, where the creation of the obligation is the illegal act. Obviously, according to neither line of reasoning, can the subsequent compliance with the provisions of the statute help the plaintiff's case. *Association v. Berlin*, 15 Pa. Super. Ct. 400.

**CRIMINAL LAW — HOMICIDE — SIMULTANEOUS MORTAL WOUNDS.** — In a trial for homicide the court instructed that if the jury found that the defendant had inflicted mortal wounds on the deceased, they must convict, although other mortal wounds were inflicted by a person acting independently. *Held*, that the instruction is erroneous. *Walker v. State*, 42 S. E. Rep. 787 (Ga.).

A death may result from the joint contribution of wounds inflicted by separate parties. When this is the case, either may be responsible for the death if he is proved to have had the requisite intent. See *People v. Lewis*, 124 Cal. 551. But it is also possible that even after the infliction of a mortal wound, causal connection may be broken by the intervention of an independent agent, who will become solely responsible for the death. *State v. Scates*, 5 Jones (N. C.) 420. The principal case is the only instance found where the question of causal connection was presented when wounds had been inflicted simultaneously by assailants not in concert. It is entirely possible that the mortal wound inflicted by the accused would have proved fatal only after an interval, while the wound inflicted by the other person killed instantaneously. In this event the latter person should be considered solely responsible for the death, and the accused could not properly be convicted of homicide. In overlooking this possibility the instructions were erroneous.

**EQUITY — INJUNCTION — RIGHT TO PROTECTION FROM THE SEA BY NATURAL BARRIER.** — The defendant was removing sand from his land in the natural use thereof. With the natural barrier destroyed, the sea would wash away the land of an intervening owner, and then that of the plaintiff. The plaintiff applied for an injunction on the ground that the defendant would cause him irreparable injury. *Held*, that the injunction will lie. *Murray v. Pannaci*, 53 Atl. Rep. 595 (N. J., Ch.).

The decision is placed on the ground that if the defendant brought the sea onto his land he would be liable for damages caused by its escape onto the land of the plaintiff. This seems an unwarranted application of the doctrine of *Fletcher v. Rylands*, although it finds some support. *Mears v. Dole*, 135 Mass. 508. But it is an established principle that there is a right to protection from the sea by natural barriers. Where the plaintiff's land adjoins that of the defendant, an injunction will lie to prevent the removal of the shingle, when that would result in injury to the plaintiff. *Attorney-General v. Tomline*, L. R. 14 Ch. D. 58. In the analogous case of lateral support, it is held that the existence of an intermediate strip of land is immaterial, if the land of the defendant is in the zone of support. *Birmingham v. Allen*, L. R. 6 Ch. D. 284; *Keating v. Cincinnati*, 38 Oh. St. 141. There seems to be no reason why the right to protection from the sea should not be extended in a similar manner, thus affording a logical basis for the desirable result of the principal case.

**EQUITY — INJUNCTION AGAINST SEPARATE SUITS.** — The plaintiff applied for an injunction against twenty-one persons owning land adjoining the plaintiff's sulphur works, to prevent them from bringing separate suits for injuries to their several parcels of land, caused by fumes from the plaintiff's plant. *Held*, that no such community of interest exists among the defendants as will authorize an injunction. *Ducktown Sulphur, etc., Co. v. Fain*, 70 S. W. Rep. 813 (Tenn.). For a discussion of the principles involved, see 14 HARV. L. REV. 611.

**EQUITY — PURCHASE FOR VALUE WITHOUT NOTICE — ASSIGNMENT OF JUDGMENT THROUGH FRAUD.** — The plaintiff, the obligee of a judgment, was fraudulently induced to assign the same. His fraudulent assignee in turn assigned to the defend-



ant, who gave value, without notice of the plaintiff's equities. On discovery of the fraud the plaintiff filed a bill to have both assignments set aside. *Held*, that the defendant took free from the equities of the plaintiff. *Luecht v. Pearson*, 65 N. E. Rep. 363 (Ill., Sup. Ct.). This decision reverses the holding of the lower court, for a discussion of which see 16 HARV. L. REV. 66.

**EVIDENCE — TESTIMONY AT FORMER TRIAL — WITNESS ABSENT FROM JURISDICTION.** — *Held*, that the official stenographic report of the testimony of a witness at a former trial of the same action is admissible in evidence, where the witness is permanently absent from the jurisdiction, although no effort has been made to find him. *McGovern v. Smith*, 53 Atl. Rep. 326 (Vt.).

It is a generally recognized exception to the rule against hearsay that evidence given at a former trial of the same action may, under certain circumstances, be admitted. In England it seems that the witness must be dead, insane, or kept away by the procurement of the opposite party. See *Regina v. Scaife*, 17 Q. B. 238. In America the courts are generally more lenient, but the decisions are conflicting. Inability to find the witness has been held enough. *Thompson v. State*, 106 Ala. 67; *contra*, *Crary v. Sprague*, 12 Wend. (N. Y.) 45. The same is true of illness of the witness. *Howard v. Patrick*, 38 Mich. 799; *contra*, *Commonwealth v. McKenna*, 158 Mass. 207. The evidence is also admitted by the weight of authority in circumstances like those of the principal case. *Giberson v. Mills Co.*, 187 Pa. St. 513; *contra*, *Berney v. Mitchell*, 34 N. J. Law 341. This rule seems reasonable, for such evidence is more practicable than its alternative, a deposition, is less expensive, and, in general, serves the ends of justice quite as well. The witness has testified in open court, subject to cross-examination, and the correctness of the record is undoubted. In criminal cases it may be held that the accused is denied his constitutional right of facing the witnesses against him. *Finn v. Commonwealth*, 5 Rand. (Va.) 708; *contra*, *People v. Devine*, 46 Cal. 45. But this objection can, of course, have no force in civil suits.

**FRAUDULENT CONVEYANCES — RIGHTS OF EXECUTION PURCHASER — STATUTE OF LIMITATION.** — The plaintiff bought at an execution sale land which had been conveyed in fraud of creditors and levied on to satisfy a judgment against the fraudulent grantor. After the lapse of the statutory period for setting aside fraudulent conveyances, but before the time necessary to acquire title by adverse possession had run, the plaintiff brought ejectment against the defendant, who had bought the land from the fraudulent grantee, with knowledge of the fraud. *Held*, that the plaintiff's right is barred by lapse of time, since he acquired a mere equity to have the fraudulent conveyance set aside. *Brasie v. Minneapolis Brewing Co.*, 92 N. W. Rep. 340 (Minn.).

Property conveyed in fraud of creditors may be seized in the hands of the fraudulent grantee, as though no conveyance had been made, and sold on execution as the property of the grantor. *Thomason v. Neeley*, 50 Miss. 310; *Owen v. Dixon*, 17 Conn. 492. The execution purchaser may succeed in ejectment against the fraudulent grantee, provided he can show on the trial that the grantee's conveyance was fraudulent. *Mulford v. Peterson*, 35 N. J. Law 127, 132. It follows that the execution purchaser has a perfect legal title, subject to the burden of proving the conveyance fraudulent, if the grantee asserts its validity. *Thompson v. Barker*, 141 U. S. 648, 655; see FREEMAN, EXECUTIONS, § 136. The decision of the Minnesota court is contrary to authority, and incompatible with well settled views as to the nature of the rights at law to fraudulently conveyed property. It leads to this incongruity: an execution purchaser may succeed in ejectment, if he brings his action within the statutory period, as the Minnesota court admits, although at the time he comes into court it is asserted that he has a mere equity to have the title of the fraudulent grantee set aside.

**INSURANCE — CONSTRUCTIVE TOTAL LOSS — MARINE POLICIES FREE OF PARTICULAR AVERAGE.** — By a policy of marine insurance a cargo of fruit and vegetables shipped by canal boat was warranted free of particular average. The canal boat was sunk; and there was a constructive total loss. *Held*, that the insured may recover on the policy. *Devitt v. Providence, etc., Ins. Co.*, 173 N. Y. 17.

When a cargo is warranted free of particular average, the insurer is not liable for less than a total loss. See ARNOULD, MARINE INS., 7th ed. § 884. This, however, in marine insurance may be either absolute or constructive. *Roux v. Salvador*, 3 Bing. N. C. 286. But there is a conflict whether a constructive total loss is insured against when there is a warranty free of particular average, especially when as in the principal case the warranty is applied to "memorandum" or perishable articles. In England, in all cases, a constructive total loss is as much within an insurance policy as an abso-

lute total loss. *Adams v. McKensie*, 13 C. B. N. S. 422; *Sailing Ship Blaimore Co. v. MacKredie*, [1898] A. C. 593. In the United States, however, the law is in confusion. A few decisions are in accord with the entire English doctrine. *Poole v. Protection Ins. Co.*, 14 Conn. 47. Other courts agree in part, but have not decided whether the doctrine applies when the insurance is on memorandum articles. *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172. In the United States Supreme Court, in the case of non-perishable goods there must be either a total loss of value or an absolute total loss. *Ins. Co. v. Fogarty*, 19 Wall. 640. But insurance on memorandum articles cannot be recovered if the articles continue to exist in specie. *Washburn, etc., Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1. The decision in the principal case, bringing New York squarely into line with England, marks the tendency toward relaxing the law in favor of the insured. Cf. *Cocking v. Fraser*, 4 Doug. 295; *McGrath v. Church*, 1 Cal. Cas. 195; *Chadsey v. Guion*, 97 N. Y. 333.

**INSURANCE — POLICY ON PROPERTY FRAUDULENTLY CONVEYED — RECOVERY BY GRANTEE.** — Creditors had procured a decree that a certain conveyance was fraudulent. The property was later damaged by fire, and the creditors sued the grantee and the insurance company for the proceeds of a policy taken out by the grantee. *Held*, that the proceeds of the policy go to the grantee. *Steinmeyer v. Steinmeyer*, 42 S. E. Rep. 184 (S. C.). See NOTES, p. 361.

**INTERNATIONAL LAW — EXTRADITION — SUBSEQUENT ANNEXATION OF LOCUS DELICTI BY DEMANDING STATE.** — The prisoner committed a crime at Johannesburg before 1900, the date of the annexation of the South African Republic by Great Britain. Under the treaty of 1889 between the United States and Great Britain, the latter state subsequently asked for his extradition. Upon arrest the prisoner brought *habeas corpus* proceedings. *Held*, that since Johannesburg was not within the jurisdiction of Great Britain at the time of the offense, the prisoner must be discharged. *In re Taylor*, 118 Fed. 196 (Dist. Ct., Mass.).

Demands for extradition should generally be considered in the light of the conditions existing at the time the demands are made rather than at the time the crime was committed. See 2 CALVO, DROIT INTERNAT. § 1064; 2 CLUNET, 461, *Suisse Tribunal fédéral*, 25 juin 1875. Nor is the principle that penal law shall not be retroactive infringed by this, for extradition is neither a punishment nor an act of criminal procedure. 7 CLUNET, 406, *Suisse Tribunal fédéral*, 22 mars 1879; *In re De Giacomo*, 12 Blatch. (U. S. Circ. Ct.) 391. Consequently it has been held that extradition will be granted for a crime committed before the existence of the treaty under which it is asked. *In re De Giacomo, supra*. That an annexing state may punish a crime committed against the laws of the absorbed state is clear. See *Damon's Case*, 6 Me. 148. There would seem then to be no distinction between the principal case and *In re De Giacomo, supra*. In each case the demanding state alleges an extraditable offense, which it can punish, committed in territory to which a treaty now extends. The decision in the principal case is difficult to support.

**MUNICIPAL CORPORATIONS — LIABILITY TO SPECIAL TAX-PAYERS FOR COMPLETION OF LOCAL IMPROVEMENTS.** — A city released a paving contractor and his solvent surety, and relet the contract at increased cost. Abutting owners, assessed for the cost under the first contract, and then for the increase, sued the city to recover this second amount. *Held*, that the city is liable therefor. *Louisville v. Kentucky, etc., Co.*, 70 S. W. Rep. 627 (Ky.). See NOTES, p. 360.

**PROPERTY — ADMINISTRATION — SET-OFF OF DEBT BARRED BY STATUTE OF LIMITATIONS.** — An heir owed an estate a debt the recovery of which was barred by the Statute of Limitations. *Held*, that the administrator can retain the amount of the debt from the distributive share of the heir. *Holden v. Spier*, 70 Pac. Rep. 348 (Kan.). For a discussion of the principles involved, see 14 HARV. L. REV. 73.

**PROPERTY — ADVERSE POSSESSION — TACKING.** — In ejectment the plaintiff claimed through his own adverse possession and that of his predecessors, A, B, C and D. The only privity between A and B arose from an invalid sheriff's sale and transfer. *Held*, that such privity is not enough to justify tacking the adverse possessions. *Johnston v. Case*, 42 S. E. Rep. 957 (N. C.). For a discussion of the principles involved, see 13 HARV. L. REV. 52; 14 *ibid.* 72.

**PROPERTY — APPOINTMENT UNDER GENERAL POWER — TITLE IN EXECUTORS AS SUCH.** — By the Finance Act of 1894, § 9, (1), estate duty on property which passes to the executor as such is payable out of the residue, whereas estate duty on property not



passing to the executor as such is a first charge on the specific property. X, having a general power of appointment over personal property, exercised it by will. *Held*, that it passes to the executor as such, and the duty is payable out of the residue. *Re Fearnside's Estate*, [1903] 1 Ch. 250.

Where personal property is appointed by will under a general power and executors are named, the property passes to the executors of the will. *Re Philbrick's Settlement*, 34 L. J. Ch. 368; *Re Hoskin's Trusts*, 6 Ch. D. 281. It is an open question, however, in what character the executors take. In three cases it has been held that the executors take as trustees for the appointee. *In re Treasure*, [1900] 2 Ch. 648; *In re Maddock*, [1901] 2 Ch. 372; *In re Power*, [1901] 2 Ch. 659. On the other hand, it has been held in two cases that the executors take as such. *In re Moore*, [1901] 1 Ch. 691; *In re Dixon*, [1902] 1 Ch. 248. The principal case reaches the same result as the latter cases by reference to other sections of the Finance Act of 1894. It is submitted that the result reached is correct. When the executor has received the property appointed under a general power he must, if necessary, use it as assets for payment of the testator's debts, before turning over the residue, if any, to the appointees. *Townshend v. Windham*, 2 Ves. Sen. 1; *Clapp v. Ingraham*, 126 Mass. 200. Since it is only as executor that he is bound to pay testator's debts, the settled rule represented by those cases tends to sustain the principal case.

PROPERTY — CONTINGENT REMAINDERS — ATTACHMENT IN EQUITY. — *Held*, that equity will not order the sale of a debtor's contingent remainder at the suit of a creditor. *Howbert v. Cawthorn*, 42 S. E. Rep. 683 (Va.).

Contingent remainders were originally inalienable at law, except by estoppel, though assignable in equity. Accordingly, courts of equity, being reluctant to offer the purchaser merely a possible right to specific performance, refused to order the sale of a debtor's contingent remainder. *Watson v. Dodd*, 68 N. C. 528. This does not seem a necessary conclusion, for a contingent remainder already had been held to pass to an assignee in bankruptcy. *Higden v. Williamson*, 3 P. Wms. 132. This is the better rule to-day. *Whelen v. Phillips*, 151 Pa. St. 312; *contra*, *Re Wetmore*, 108 Fed. Rep. 520. By statutes almost everywhere in force contingent remainders are now transferable by deed. Therefore equity will compel specific performance of a contract for their sale. *Matter of Asch*, 75 N. Y. App. Div. 486. It would seem that any property of a debtor, certainly any transferable at law, should be subject to the payment of his debts, and the decision in the principal case seems therefore unfortunate. See *Daniels v. Eldredge*, 125 Mass. 356; but see *contra*, 68 Va. L. Reg. 573. There appears to be little authority on the point.

PROPERTY — LANDLORD AND TENANT — IMPLIED COVENANT FOR QUIET ENJOYMENT. — The defendant held premises under a lease containing a covenant not to use them for trade purposes. He sublet to the plaintiff, who was unaware of the restrictive covenant in the defendant's lease. The plaintiff proceeded to use the premises for trade purposes, but was enjoined from doing so at the instance of the defendant's lessor. *Held*, that the defendant's implied covenant for quiet enjoyment has not been broken. *Jones v. Lavington*, 19 T. L. R. 77 (Eng., C. A.).

It is well settled that a covenant for quiet enjoyment is implied from the ordinary words of leasing. *Budd-Scott v. Daniell*, [1902] 2 K. B. 351; *Dexter v. Manley*, 4 Cush. (Mass.) 14. The scope of this covenant, however, has not been clearly defined. No doubt the covenant, whether express or implied, is broken when the enjoyment of the premises is substantially interfered with by the lessor or those claiming under him. See *Robinson v. Kilvert*, L. R. 41 Ch. D. 88, 96; *Sanderson v. Mayor, etc.*, L. R. 13 Q. B. D. 547. But when the interference is by one having a title paramount to that of the lessor, the tendency of the English courts is to hold that an implied covenant is not broken. Thus there is no breach of such a covenant if, upon the termination of the lessor's estate, the lessee be evicted by the remainderman. *Baynes v. Lloyd*, [1895] 2 Q. B. 610; see 9 HARV. L. REV. 434. Moreover, even an express covenant is not broken when the lessor's title is encumbered with restrictions upon the user of the premises, and these restrictions are enforced against the lessee. *Dennett v. Atherton*, L. R. 7 Q. B. 316. The principal case would seem to be a consistent application of the English law as settled by these decisions. On principle, however, this doctrine seems too harsh; and probably the implied covenantee would be more fully protected in America. Cf. *Hamilton v. Wright's Admr.*, 28 Mo. 199; *Duncklee v. Webber*, 151 Mass. 408; *Kane v. Mink*, 64 Ia. 84.

PROPERTY — RIGHT OF LATERAL SUPPORT — NOTICE OF EXCAVATION NEAR BOUNDARY. — An owner excavated near the building of the plaintiff, who knew of the proposed excavation. *Held*, that the failure of the defendant owner to give notice of

the extent of the excavation renders him liable for damages to the building. *Davis v. Summerfield*, 42 S. E. Rep. 818 (N. C.).

It is settled law that the owner of a building has no natural right to have it supported by the land of an adjacent owner. *Dalton v. Angus*, 6 App. Cas. 740. The generally recognized doctrine that an owner is entitled to proper notice of excavations on neighboring land which will endanger his buildings, apparently owes its origin to the disposition of the courts to alleviate some of the hardships incident to this rule. See *Shafer v. Wilson*, 44 Md. 268; *Schultz v. Byers*, 53 N. J. Law, 442. No decision has been found which attempts to define proper notice, but the holding of the principal case that it must include information of the extent of the excavation, is inconsistent with the assumption of some courts that if the neighbor has actual knowledge of the intention to excavate, there is no obligation to give him formal notice. See *Schultz v. Byers*, *supra*; *Uerick v. S. Dak., etc., Co.*, 2 S. Dak. 285. But the purpose of the rule is to give the neighbor an opportunity to protect his property, and since the question whether or not it is endangered depends upon the character of the excavation, it seems reasonable that he should be entitled to information of the extent as well as of the fact of the proposed change.

PROPERTY — WILLS — SURVIVORSHIP. — A will gave property to the only son of the testatrix, but "in the event of my becoming the survivor . . . of my son," then to the appellant. The mother and son perished in a common disaster, and no evidence was produced as to who survived. *Held*, that the appellant was entitled to the property. *The Young Women's Christian Home v. French*, 23 Sup. Ct. Rep. 184. See NOTES, p. 368.

STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR — OPTION TO TERMINATE. — It was orally agreed that the plaintiff should work for the defendant for two years, but might terminate the contract in six months. *Held*, that the contract is void under the Statute of Frauds. *Biest v. Ver Steeg Shoe Co.*, 70 S. W. Rep. 1081 (Mo., Sup. Ct.).

A parol contract of personal service for life is not void, though the parties may in fact contemplate a performance lasting longer than a year. *Souch v. Strawbridge*, 2 C. B. 808. But a parol contract to serve for a definite period of more than one year is invalid. *Freeman v. Foss*, 145 Mass. 361. The parties having expressed their intention, the contract may be rendered impossible, but will not be performed by death. The English and some American courts apply this doctrine even where, as in the principal case, the contingent termination of the contract is provided for by its terms. *Dobson v. Collis*, 1 H. & N. 81; *Meyer v. Roberts*, 46 Ark. 80. In other jurisdictions the provision for performance during more than a year must be unqualified. *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46; *Blake v. Voigt*, 134 N. Y. 69. It seems that the principal case might better have adopted this latter view. The express terms of the contract would be performed by the exercise of the option equally as well as by service for two years. The parties having expressed an indifferent intention as to time for performance, the contract is on the same footing as one in which they express no intention at all. Such parol agreements are universally held not within the Statute. *Peter v. Compton*, Skin. 353.

TORTS — CONTRIBUTORY NEGLIGENCE — LAST CHANCE DOCTRINE. — *Held*, that the plaintiff, having the last chance to avoid the accident, cannot recover. *Barnhill v. Texas & P. R. R. Co.*, 33 So. Rep. 63 (La.). See NOTES, p. 365.

TORTS — DECEIT — MISREPRESENTATION BROUGHT ABOUT BY DEFENDANT. — A commercial agency gave the defendant an erroneous rating based in part on false information given it by the defendant as to his financial condition. Relying on this rating, the plaintiff furnished goods to the defendant on credit. The defendant became bankrupt. *Held*, that the plaintiff can recover in an action for deceit. *Tindle v. Birkett*, 171 N. Y. 520, reversing the decision in 57 N. Y. App. Div. 450. For a discussion of the decision in the lower court, see 15 HARV. L. REV. 158.

TORTS — PROXIMATE CAUSE — NERVOUS SHOCK FROM TORT TO THIRD PARTY. — A conductor in the employ of the defendant company committed a tort on a child in the presence of her mother. *Held*, that as a matter of law, the mother cannot recover for permanent injury to her health resulting from nervous excitement caused by the assault on the child. *Sanderson v. Northern Pac. R. R. Co.*, 92 N. W. Rep. 542 (Minn.).

In Minnesota there may be recovery for physical injuries from nervous shock due to fear on the part of the plaintiff of injury to himself. *Purcell v. St. P. City Ry. Co.*, 48

Minn. 134. It is impossible to distinguish such cases from the present one, otherwise than by a purely arbitrary line. When it is decided that physical impact is unnecessary, the courts should recognize that in this new condition the former limitations of assault are inapplicable. Nervous shock may come from various causes. Certainly in a mother it may come as naturally from fear for her child, as for herself. It is difficult to see why the case should not have gone to the jury to determine, if under the circumstances and according to the general principles of legal cause, the injury to the mother was the probable and proximate result of the assault on the child. This would undoubtedly be a wide extension of tort liability, but unless public policy be invoked, it seems impossible to escape this result. The reasoning of one case would seem to lead to this conclusion. *Wilkinson v. Downton*, [1897] 2 Q. B. 57. In accord with the principal case, however, see a *dictum* in *Dulieu v. White*, [1901] 2 K. B. 669, 675.

**TORTS — PROXIMATE CAUSE — OWNER BURNED IN SAVING PROPERTY.** — The defendant negligently started a fire, and the plaintiff, while endeavoring to save his property was severely burned without negligence on his part. *Held*, that the plaintiff cannot recover. *Logan v. Wabash R. R. Co.*, 70 S. W. Rep. 734 (Mo., Ct. App.).

The case refuses recovery on the ground that the plaintiff's act in attempting to save the property was an intervening cause. This reason seems hardly sound. Since the plaintiff was only making such reasonable effort to save his property and to avoid damages as the law requires, the causal connection should be held not broken. If liability is to be denied it should be on the ground that injury was not foreseeable, provided the plaintiff used due care. *Seale v. Gulf, etc., R. R. Co.*, 65 Tex. 274. But injuries in fighting fire are certainly not unlikely. The weight of the little authority found is that they are to be deemed foreseeable. *Liming v. Ill. Cent. R. R. Co.*, 81 Ia. 246; *Berg v. Great Northern R. R. Co.*, 70 Minn. 272, *semble*. When a wrongdoer forces another to a dangerous task, injuries are probable and recovery should be allowed if harm results. *Page v. Bucksport*, 64 Me. 51.

**WILLS — MISTAKE — STRIKING OUT ERRONEOUS CLAUSE.** — As a result of an attorney's error, the testatrix had devised only "an undivided moiety of and in" certain lands, in which she in fact had the entire interest. The draft of the will had been read by her, but it was found that this particular provision had never been noticed and approved. *Held*, that probate should be granted without the clause quoted above. *Briscoe v. Baillie Hamilton*, [1902] P. 234.

If a will has not been read to or by the testator, a word inserted by mistake may be struck out although a bequest is thereby increased. *Morrell v. Morrell*, 7 P. & D. 68. But if the will has been thus read, knowledge of its contents is conclusively presumed. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109. The decision in the principal case following a later *dictum*, refuses probate of a disputed clause unless a jury could infer that the testatrix had confirmed it. See *Fulton v. Andrew*, L. R. 7 H. L. 448, 464. The decision seems especially unfortunate. The striking out of the clause inserted by mistake, increases the estate of the devisee, who thereby takes an unattested devise, in complete disregard of the express terms of the Wills Act. Moreover the instrument is not probated as formally executed by the testatrix with knowledge of its contents. To avoid any such result, the policy of the law would seem to demand that no interference with the terms of the will should be allowed except in cases of fraud. There are few American decisions on this precise point, but the tendency of the courts is against permitting any change in the instrument executed by the testator. *McAlister v. Butterfield*, 31 Ind. 25; MERWIN, EQ., § 490; but see *contra*, SCHOULER, WILLS, § 219.

## BOOKS AND PERIODICALS.

**RESCISSION OF STOCK SUBSCRIPTIONS FRAUDULENTLY PROCURED BY PROMOTER.** — The courts have been called upon in a number of instances to decide whether a subscriber to stock of a projected corporation can, after the formation of the corporation and the acceptance of his subscription, rescind the subscription on the ground that it was induced by the fraudulent misrepresentation of the promoter. A non-existing corporation cannot have agents; consequently, as it is thus impossible to attribute the fraud of the promoter to the corporation on grounds of agency, rescission has generally been denied. *Oldham v. Mt. Sterling, etc., Co.*, 103 Ky. 529; *St. John's Mfg. Co. v. Munger*, 106 Mich. 90; *contra*, *McDermott v. Harrison*, 9 N. Y. Supp. 184. However, in an elaborate discussion in one of the recent magazines, it is attempted to present a sound basis for allowing rescission. *Can a Subscriber to Stock of a Corporation not yet Formed Rescind his Subscription on the Ground of Fraud?* By Albert Cabell Ritchie, 36 Am. L. Rev. 855 (Nov.-Dec., 1902).

Judge Ritchie contends that rescission should be allowed on the same grounds as those on which a corporation which, after its formation, knowingly accepts property or services contracted for by a promoter, is required to make payment. As to the basis of this latter liability, there has been a wide diversity of opinion. See 14 HARV. L. REV. 536 and 36 Am. L. Reg. N. S. 609. The author, however, does not examine the true principles which underlie the decisions. He contents himself with the broad assertion that in these cases the corporation cannot separate the burden from the benefit, and argues that similarly a corporation should not be allowed to separate the burden from the benefit, that is, to deny the possibility of rescission, in cases where subscriptions have been procured by a promoter's fraud. But generalities of this nature do not go far in the solution of technical legal difficulties. There can be nothing fundamentally common between the two classes of cases. In one of them a corporation is required to pay for property or services contracted for by a promoter which it accepts with knowledge; in the other it is sought to attribute to the corporation the promoter's fraudulent misrepresentations regardless of the corporation's knowledge.

As to the legal relation between a subscriber to stock in a non-existing corporation and the corporation when formed, it seems generally to be agreed that a subscription is a revocable offer by the subscriber, which becomes a binding contract on acceptance by the corporation, the mere organization of the corporation being sufficient to constitute an acceptance in some jurisdictions, while in others a further and formal act by the company is required. *Athol Music Hall Co. v. Carey*, 116 Mass. 477; *Budger Paper Co. v. Rose*, 95 Wis. 145; *Miller v. The Wild Cat, etc., Co.*, 52 Ind. 51. No court has gone so far as to hold that if malicious C by fraudulent misrepresentations induces A to offer his house for sale to B, between whom and C no agency relation exists, and B innocently accepts the offer, A can rescind because of C's fraud. This appears to be exactly the situation in the cases under discussion.

The possibility of an interesting distinction is suggested by the holdings of the English cases, where it appears that rescission is allowed if the corporation at the time of the acceptance of the subscription had knowledge of the fraud, but not otherwise. *In Re Metropolitan, etc., Assn.*, [1892] 3 Ch. 1; *In Re Metal Constituents, Ltd.*, [1902] 1 Ch. 707. On broad principles of contract and equity it seems that one who accepts a fraudulently induced offer with knowledge of the fraud should not be permitted to avail himself of the contract. *Law v. Grant*, 37 Wis. 548. The distinction can be of little practical importance, however, as in those jurisdictions where mere incorporation constitutes acceptance, it is impossible to attribute knowledge to the corporation; and in those jurisdictions where actual acceptance is required, it is unlikely that the corporation will have knowledge.

**ASSENT TO CONTRACT UNDER MISTAKE AS TO OFFEROR'S IDENTITY.**— Peculiar situations of fact often present difficult questions as to the existence of the mutual assent necessary to the formation of a contract. Suppose that A in the presence of X represents himself as B, a man of recognized credit, and X, believing that he is negotiating with B, accepts A's offer for a contract. The Massachusetts court has held that, under these circumstances, a contract is formed, though it is voidable as between the parties. *Edmunds v. Merchants' Despatch, etc., Co.*, 135 Mass. 283. Suppose on the other hand that A makes the offer by letter, representing himself as B, and X accepts by mail. On substantially this state of facts the House of Lords has decided that no contract arises. *Cundy v. Lindsay*, 3 App. Cas. 459. The writer of a recent article agrees with the Massachusetts decision, but regards the English case as inconsistent with it. *Mutual Assent in Contracts*, by Clarence D. Ashley, 3 Colum. L. Rev. 71 (Feb., 1903). Dean Ashley contends that in both cases X assents to a contract with A. He argues from the initial position that where A is actually in the presence of X, the latter clearly intends to contract with the personality before him, and that accordingly a contract is formed with that personality. He then puts a series of cases, supposing first that a board partition had concealed A from X during their conversation, next that the communication had been by telephone, then by telegraph, and lastly by letter. "In each case," he says, "the intention is to communicate with the personality operating the voice, the telephone, the telegraph instrument or the pen that writes the letter."

In discussing mutual assent it must be recognized at the outset that the expressed and not the secret intent of the parties is to govern. The question of interpretation is thus clearly stated by Mr. Justice Holmes: "We ask, not what this man meant, but what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." 12 HARV. L. REV. 417. Applying this test to the facts of the cases under consideration, one notes that X evinces an intention to contract with but one person. To this person he evidently gives two attributes: that of being the person who made the offer, and that of being B, the man of good credit. These attributes, however, do not in fact co-exist in the same person, but each describes a distinct individual. To determine which of these individuals is in reality the one with whom X intends to contract, it is necessary to ascertain which of the attributes would under the circumstances naturally be foremost in his mind, and which subsidiary. Is his attitude "I accept the proposition of B, the man of credit (who has made this offer)," or is it "I accept the proposition of this offeror (who is B, the man of credit)"?

This question must be decided on the facts of each case. The Massachusetts decision seems correct. The individual before X whom he sees and hears, and to whom he talks, clearly must be considered as the personality foremost in his mind. His mistake as to identity does not prevent a contract from arising. The English case at the other extreme also appears well decided, notwithstanding the author's adverse criticism. In that case the personality of the actual offeror, A, whose pen wrote the letter would seem not to present itself to X so forcibly as that of B, the responsible business man whose name is appended to the letter as being ostensibly that of the actual offeror. A contract therefore does not arise because B, the supposed offeror, has in fact made no offer. In regard to the supposititious cases between these extremes, a difference of opinion may well exist. As the personality of the actual offeror becomes less obtrusive, that of the responsible business man, the ostensible offeror, comes into prominence. Probably, however, as long as the communication between A and X is immediate, the personality of the actual offeror should be held to predominate; and hence the line should be drawn between the telegraph operator and the letter writer. A contract would thus arise in every case put by the author except that in which the communication was by mail.

The author's disagreement with the English court would seem to be merely on a question of interpretation and not of law, and on this issue a difference of opinion is not surprising. The view of the English court, however, seems preferable. 14 HARV. L. REV. 60.



**PAYMENT FOR STOCK IN PROPERTY.** — When a "trust" is formed by the combination of independent plants, the stock of the "trust" is usually issued in exchange for the plants. For this reason, a recent article in the American Law Review is worthy of attention. *Payment for Shares in Property*, by Seymour D. Thompson, 36 Am. L. Rev. 840 (Nov.-Dec., 1902). Mr. Thompson concedes that shares may be sold at their par value for property at its true valuation. He goes on to point out that even though the property is over-valued, most courts will uphold the transaction in the absence of fraud, even as against creditors of the corporation. He himself, however, evidently prefers the view that property is payment to the extent only of its true value, not of the contract valuation.

To avoid confusion, it is important to consider first the rights of creditors when shares of a corporation are issued as "full-paid" at less than par for cash. A creditor who had no knowledge of the fact at the time his claim arose, may, in equity, in case the corporation becomes insolvent, have the agreement by which the part payment was received in full satisfaction set aside, and may then force any holder not claiming through a *bona fide* purchase to contribute the unpaid balance on the par value of his stock. *Scovill v. Thayer*, 105 U. S. 143; *Upton v. Tribilcock*, 91 U. S. 45. The ground of relief is that issuing shares for less than par is a fraud on creditors, since credit has presumably been given to the corporation on the representation that its subscribed capital is available as a fund to pay its debts. It follows that a creditor who knows of the issue below par or one whose claim arises before such issue, has no remedy, since he cannot have acted upon such a representation. *First National Bank v. Gustin, etc., Mining Co.*, 42 Minn. 327.

When shall shares issued not for cash, but for property, be considered "full-paid"? If money already received from a sale of stock at par for cash were used in purchasing property from the stockholder, no over-valuation of the property would invalidate the transaction unless it were fraudulent. The rule should be no different when the same result is achieved by issuing the shares directly for the property. The practical consideration that the tendency toward fraud may then be greater than in case of a subscription and a subsequent purchase made *bona fide* as an independent transaction, is offset by the equally practical consideration that the rule imposing liability when property has been over-valued is unjust to the owner, since it deprives him of the benefit of any good bargain that he may make, and at the same time leaves him without remedy in case the property is under-valued. On principle, then, over-valuation should impose no liability unless it is fraudulent. This rule is supported by the great weight of authority. *Brant v. Ehlen*, 59 Md. 1; *Coffin v. Ransdell*, 110 Ind. 417.

If, however, the over-valuation has been fraudulent, subsequent creditors should be allowed to have the bargain by which the property was received in payment set aside in equity, and the holders of the stock should be liable for the difference between its par value and the true value of the property turned in. Some courts seem to consider that the only remedy is a rescission of the whole bargain, the corporation returning the property and receiving back the stock. See *Du Pont v. Tilden*, 42 Fed. Rep. 87. This view, although supported by Mr. Cook in his work on Corporations, in § 42, not only gives the creditor a worthless remedy, since the stock is seldom more valuable than the property, but also seems to overlook the fact that when shares are issued for property there is a double transaction, — a subscription for stock and a payment of that subscription in property. As has already been stated, when the agreement by which shares are sold for cash at less than par is set aside, the subscriber still remains liable on his subscription. By the great weight of authority the same result follows when the bargain by which specific property is accepted in payment is set aside for fraud. *Coleman v. Howe*, 154 Ill. 458; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28. If, however, the stock is transferred to an innocent purchaser for value, the latter is not liable. *Berry v. Rood*, 168 Mo. 316.



**PRACTICE IN PERSONAL ACTIONS IN THE COURTS OF MASSACHUSETTS.**  
By Sidney Perley. Boston: George B. Reed. 1902. pp. xlix, 728.  
8vo.

Recognizing the special opportunity, created by the appearance of the Revised Laws of Massachusetts, for a new publication on the practice in the courts of this commonwealth, Mr. Perley has sought to supply the legal profession with a work which should in all respects be up to date. The mere fact that whenever a statute is quoted or mentioned the reference is to the late revision, would in itself be sufficient to give the book a value which no work of former years possesses; but in addition to this advantage there is the further one that the author has been able at various points to make his work more nearly complete for present purposes than earlier publications, by reason of the late decisions. That he has not more fully availed himself of these recent cases is however to be deplored. For instance, under the heading of "Interrogatories" he tells us that the president or some other officer of a corporation may be examined as if he were a party, and he gives the citation of the statute which so provides. But he cites no case, and does not amplify the subject. Yet the case of *Gunn v. N. Y., N. H. & H. R. R.*, 171 Mass. 417, which is cited in the Revised Laws, decides that when an officer of a corporation is interrogated as to matters concerning the corporation of which he has no personal knowledge, he may be required to ascertain the facts and answer the questions. Certainly this is a considerable amplification of the bare words of the statute, and a decision of enough importance to deserve a place in a treatise on practice. Such an omission seems a distinct neglect of opportunity and is a very real defect in a new book. Apart from such omissions, however, the work must prove decidedly useful. As is usual in books of this character, necessary or conventional forms for writs, pleadings, and other papers which might be needed in the prosecution of an action are inserted at the appropriate places, and the rules of the courts are given at length.

The arrangement of the material comprised within the work is logical and convenient; it indicates the order of the proceedings and their mutual relations, and brings out clearly their bearing on the final result. The author deals first with the courts, their jurisdictions, their rules, and their officers, and then discusses, separately and carefully, the various possible steps that may be taken in an action, from its very beginning to its completion. Altogether the volume contains, in compact form, a large amount of practical information for use in the every-day business of a lawyer.

R. A. J.

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**IRRIGATION INSTITUTIONS.** A Discussion of the Economic and Legal Questions Created by the Growth of Irrigated Agriculture in the West. By Elwood Mead. New York: The MacMillan Company. 1903. pp. xi, 392.  
12mo.

This is the latest addition to the Citizens' Library of Economics, Politics and Sociology, edited by Professor Richard T. Ely, an excellent series of popular treatises upon some of the important questions of the day. The present work deals with the problems and difficulties of systematic irrigation, which is such a vital matter in the arid regions of our country, and discusses the subject from the historical, economic and legal points of view. The legal aspect of the question is particularly emphasized; for the peculiar conditions prevailing where irrigation is necessary have greatly affected the law of water rights. In several of the western states the common law doctrine of riparian rights has been entirely abrogated and the doctrine of priority of appropriation substituted. In others these two conflicting doctrines persist to a certain extent side by side. In either case many legal tangles occur. Matters are still further complicated, where rivers flow through more than one state, by most important questions of interstate rights. The author's clear statement of the legal situation and of the steps taken by the different states towards the solution of some of the difficulties incident to it, makes the book, though not distinctively of a legal

character, of considerable interest and importance to the student of this branch of the law. Then too the history of irrigation, and the administrative and economic problems involved in its development are thoroughly treated, with especial reference to conditions existing in each of the states concerned. Many reforms are suggested by the author as being necessary for the full perfection of the system. The book is certainly a comprehensive survey of the institutions and problems of irrigation, and will prove an excellent source of information for any who are interested in the subject.

W. H. H.

**BRITISH RULE AND JURISDICTION BEYOND THE SEAS.** By the late Sir Henry Jenkyns. Preface by Sir Courtenay Ilbert. Oxford: Clarendon Press. 1902. pp. xxiii, 300. 8vo.

To the general reader the preface may prove the most interesting part of this book. Sir Courtenay Ilbert and others here give their impressions of Sir Henry Jenkyns, and of his work in the office of Parliamentary Counsel to the Treasury, which he held for many years. One hardly knows of another book where the duties of the Parliamentary Counsel, and his place in the English legislation of to-day, are suggested better than here. To Americans this preface is peculiarly instructive.

The main part of the book deals with the jurisdiction actually exercised by the United Kingdom beyond the territorial limits of Great Britain and Ireland; the means by which such jurisdiction is exercised; and, to some extent, the constitutional theories on which the jurisdiction is based. Taking up the various kinds of British dependencies, and discussing consular jurisdiction and the extraterritorial jurisdiction of British courts, the author states concisely, and very carefully, the limits of the jurisdiction in fact now existing. The references to English statutes are exceedingly numerous. The work has apparently been prepared with great thoroughness, and cannot fail to be of value to the student of government.

J. B. S.

**A TREATISE ON THE LAW OF PRIVATE CORPORATIONS.** By Henry Osborn Taylor. Fifth edition. New York: The Banks Law Publishing Co. 1902. pp. xiii, 969. 8vo.

The changes in the present edition of this standard work are not very numerous nor very sweeping, the principal one being the addition of some eight hundred recent adjudications by way of citation, together with such modifications of the text as seemed necessary to make it conform to the present state of the law. There has been added also a brief discussion of the so-called "Securities Companies," — necessarily, perhaps, somewhat inadequate because of the absence of decisions on the important question of their legality. But the most striking feature of Mr. Taylor's work, in this as in former editions, is his frank rejection of the doctrine that corporations are distinct entities — legal *personæ*, — a doctrine supposedly established among the fundamental conceptions of the law. "Corporation" in Mr. Taylor's terminology has a double signification: on the one hand it may mean "the sum of legal relations subsisting in respect to the corporate enterprise"; on the other it is used to designate "the body of individuals in whom and their appointees are vested the corporate powers." The second meaning obviously accords with the popular notion; the former is Mr. Taylor's substitute for the "legal entity" theory. His conception avoids certain theoretical difficulties raised by the "entity" theory, as, for example, the question whether corporations may properly sue on stock subscriptions made before incorporation, and questions arising out of "double incorporation"; on the other hand it seems not to square so well with the diverse citizenship rule of the United States courts, and it involves difficulties in the matter of title to corporate property. Inasmuch, however, as the exponents of the two oppos-

ing theories are in substantial agreement as to what the law is, the question has perhaps little more than academic significance. Indeed, it may be doubted whether, in the last analysis, Mr. Taylor's formula is not simply one way of defining a legal *persona*, as distinguished from a natural person, and thus essentially in accord with the commonly accepted view. There can be no doubt, however, that his view furnishes the basis for a very clear and simple classification of the entire subject. Starting with an analysis of the idea of a corporation in Roman law and in the common law, he next deals with the legal effect of acts done prior to, and looking towards, incorporation; he then considers the legal relations, growing out of incorporation, between the various parties -- state, corporation, officers, stockholders and creditors -- between whom legal relations may subsist "in respect to the corporate enterprise"; and finally he considers the relations existing among the members of each class.

In some portions of the work there is manifest a tendency, all too common nowadays, to overwork the doctrine of estoppel. For instance, in dealing with the subject of *de facto* corporations Mr. Taylor makes the rules of law concerning them turn purely on estoppel, with the result that some cases are included that involve merely matters of estoppel, and do not depend on the alleged corporation's being even *de facto*; at the same time other cases are included that admittedly do not contain the elements of estoppel. It would seem better to concede that these rules require no more abstruse explanation than the public policy of reserving to the state alone the right to complain of the failure to comply strictly with the requirements it has prescribed. In a similar way the doctrine of estoppel is applied to questions relating to *de facto* officers. It is again brought forward in dealing with the subject of *ultra vires*, but here, it would seem, to better purpose. The entire subject of *ultra vires* is clearly presented. There is much to be said in favor of Mr. Taylor's view, which makes the enforceability of *ultra vires* contracts depend primarily upon estoppel, as opposed to the two most widely accepted views, -- that of the New York courts, as laid down in a line of cases beginning with *Bissell v. R. R.*, 22 N. Y. 258, making the right of enforcement turn on performance, and the federal rule, for which the case of *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, is usually cited, that an *ultra vires* contract can give rise to no rights on the contract. A strong argument for Mr. Taylor's view is that it rests the whole doctrine of *ultra vires* upon principles that apply equally in cases of tort and contract.

An infrequency of reference to English authorities is to be remarked throughout the work, many important English cases finding no place among the citations. Likewise, some recent American decisions of considerable authority fail to appear, although opposed to statements made in the text. Instances of this are noted in the discussion of questions of constitutional law in the chapter on "Corporation and State," and also in the chapter on "Corporation and Shareholders," in the section dealing with the right to reclaim dividends paid out of capital. Again, no mention is made of the so-called "one man company" cases, such as the House of Lords case of *Salomon v. Salomon & Co.*, [1897] A. C. 22, or of the line of cases represented by *Seaton v. Grant*, L. R. 2 Ch. App. 459, concerning the effect of a shareholder's motives upon his right to bring suit against the corporation. Furthermore, none of the decisions of the state courts, like *Parsons v. Joseph*, 92 Ala. 403, are cited to indicate the diversity in practice between the state and the federal courts concerning the right of a shareholder to sue in respect of wrongs that occurred before he purchased his stock. And finally, the important topic of "voting trusts" receives but a passing comment. These, however, are but minor criticisms of a work that is on the whole extremely accurate, and for a volume of such moderate proportions surprisingly complete.

A TREATISE ON THE LAW OF JUDGMENTS, including the Doctrine of *Res Judicata*. By Henry Campbell Black. Second edition. St. Paul: West Publishing Company. San Francisco: Bancroft-Whitney Co. 1902. 2 vols. pp. ccii, 1-754; xvii, 755-1592. 8vo.

The first edition of this excellent work, published in 1891, was reviewed in 5 HARV. L. REV. at p. 43. Believing, as is stated in the preface, that the cardinal principles of the law of judgments have remained substantially unchanged, the author has retained in the second edition most of the chapter and section titles of the first. A number of sections, however, have been rewritten, and seven thousand new decisions have been added to the citations. As a result of these additions, the present revision comes out some four hundred and fifty pages larger than the original work.

Although the author aims primarily to state the law as it is rather than as it should be, he does not fail in his analysis of the subject to indicate that certain doctrines, though established, constitute departures from general rules. An example of this is the treatment of the question as to the right to attack collaterally a grant of administration upon the estate of a person not in fact dead. By the weight of authority collateral attack is in such a case allowed. *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238. This, the author points out, is an "exception to the rule of conclusiveness attaching to the decree of a probate court appointing an administrator." It would seem, however, that the recent case of *Hilton v. Guyot* merits more attention than a mere statement of the point it decides. *Hilton v. Guyot*, 159 U. S. 113. That case holds that a foreign judgment will not be regarded as conclusive unless the country where it was obtained accords a similar force to an American judgment. This view, however, disregards the fundamental conception that the enforcement of a foreign judgment depends upon and is required by principles of the common law, which cannot be affected by the action of a foreign government. *The Nereide*, 9 Cranch (U. S. Sup. Ct.) 388, 422; see also DICEY, CONFL. LAWS, 10. Retaliation "is for the consideration of the government, not of its courts." *Per* Marshall, C. J., in *The Nereide*, *supra*.

Of the other important American treatises dealing with the general subject of judgments, none has appeared since Van Fleet on Former Adjudications, which was published in 1895. The publication of a work which gives access to the many cases decided since that date would for this reason alone seem timely.

CASES ON INTERNATIONAL LAW, selected from Decisions of English and American Courts. Based on Snow's Cases and Opinions on International Law. Edited with Syllabus and Annotations. By James Brown Scott, Dean of the College of Law, University of Illinois. Boston: The Boston Book Company. 1902. pp. lxvii, 961. 8vo.

In 1893, Dr. Freeman Snow, then instructor in International Law in Harvard College, published for the use of his class a collection of cases. The distinctive feature of the collection was the valuable analytic syllabus of the subject with numerous references to treatises, which Dr. Snow included in his volume. The book, though ostensibly covering the entire field, did not, however, contain all even of the leading cases in which the courts of the United States and England have applied the principles of international law; nor did the syllabus contain references to the works of some of the distinguished Continental jurists. These limitations have been removed in the edition which has just been put forth by Dean Scott.

The original arrangement has, with a few modifications, been retained. Only one new section, that discussing the effect of a change of sovereignty on local law, has been added. Yet the book is greatly altered. Generally speaking, all the leading cases in the United States and England have been gathered together, and the collection has been brought down to date. In two respects Dean Scott has departed from Dr. Snow's scheme. He has omitted all head-

notes from the cases; and he has removed from the text proper all selections from treatises on international law. Some of these selections, with many others in addition, he has inserted in the footnotes, which are thus longer and more elaborate than those of the earlier book. The footnotes also contain numerous citations of decisions bearing on the cases in the text.

Dr. Snow's syllabus has been retained, though many of its headings have been rewritten. It has, however, been greatly amplified, and is now a valuable reference manual on international law. As a collection of most of the leading cases on the subject without headnotes, the book will be readily available for law school use; and, on account of the syllabus and the notes, it will be of considerable use to students of political science. The digest-index of the present edition is far superior to the index of the earlier work.

**CYCLOPEDIA OF LAW AND PROCEDURE.** Edited by William Mack and Howard P. Nash. Vol. V. New York: The American Law Book Company. London: Butterworth & Co. 1902. pp. 1118. 4to.

**ANNUAL ANNOTATIONS TO CYCLOPEDIA OF LAW AND PROCEDURE,** covering Vols. I.-IV. 1902.

The fifth volume of this carefully edited series, the first number of which appeared less than two years ago, covers topics ranging from "Bail" to "Build," inclusive. Among the more noteworthy articles contributed perhaps the most conspicuous is that on Bankruptcy, occupying about two hundred pages. It is the result of the joint labors of Mr. James W. Eaton and Mr. Frank B. Gilbert, the former of whom had already dealt with the subject in his well-known third edition of *Collier on Bankruptcy*. The article is peculiarly welcome at this time in that it includes in its treatment the law that has been formulated or developed under the National Bankruptcy Act of 1898 by the cases decided since its passage.

The volume is accompanied by a smaller book with flexible covers, which contains the first of the collections of "annual annotations," that are to be issued from year to year. This first collection covers the topics already treated in the four earlier volumes, and gathers in accessible form the modifications that were made in the law relating to those topics during the year preceding its publication. This method of giving the profession regularly and frequently the results of constant revision can hardly fail to meet with approbation.

**A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS,** including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. By John W. Daniel. Fifth edition. By John W. Daniel and Charles A. Douglass. New York: Baker, Voorhis & Company. 1903. 2 vols. pp. cliv, 933; x, 1004. 8vo.

**GERMANY'S CLAIMS UPON GERMAN-AMERICANS IN GERMANY.** A Discussion of German Military and other Laws which may affect German-Americans temporarily in Germany, together with some Comment upon existing Treaties. By Edward W. S. Tingle, formerly United States Consul, Brunswick, Germany. Philadelphia: T. & J. W. Johnson & Co. 1903. pp. xv, 121. 12mo.

**THE LAW OF SURETYSHIP,** covering Personal Suretyship, Commercial Guaranties, Suretyship as related to Negotiable Instruments, Bonds to secure Private Obligations, Official and Judicial Bonds, Surety Companies. By Arthur Adelbert Stearns. Cincinnati: The W. H. Anderson Co. 1903. pp. xvii, 747. 8vo.

A TREATISE ON THE LAW OF THE MEASURE OF DAMAGES FOR PERSONAL INJURIES, including Suggestions on Pleading, Evidence and Province of Court and Jury, Applicable to the Trial of this Class of Cases. By George P. Voorheis. Norwalk, Ohio: The Laning Co. 1903. pp. lxxxvi, 577. 8vo.

CASES ON CRIMINAL LAW. A Selection of Reported Cases on the Criminal Law. By William E. Mikell, Assistant Professor of Law in the University of Pennsylvania. Philadelphia: International Printing Co. In two volumes. Vol. I. 1902. pp. 504. 8vo.

A TREATISE ON THE LAW OF BANKS AND BANKING. By John T. Morse, Jr. Fourth edition. By Frank Parsons. Boston: Little, Brown and Company. 1903. 2 vols. pp. cv, 1-743; 744-1490. 8vo.

THE ELEMENTS OF THE LAW OF NEGOTIABLE INSTRUMENTS. By John W. Daniel and Chas. A. Douglass. New York: Baker, Voorhis & Company. 1903. pp. xxxi, 418. 8vo.

PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE IOWA STATE BAR ASSOCIATION, held at Dubuque, Iowa, July 15 and 16, 1902. Tipton, Iowa: Conservative. 1902. pp. 225. 8vo.

REPORT OF THE MASSACHUSETTS COMMITTEE ON CORPORATION LAWS, created by Acts of 1902, Chapter 335. Boston: Wright & Potter Printing Co. 1903. pp. 306. 8vo.



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## THE REVIVAL OF CRIMINAL EQUITY.

MR. HOLLAND takes as the basis of his definition of the criminal law the functions which the state "discharges as the guardian of order, preventing and punishing all injuries to itself and all disobedience to the rules it has laid down for the common good."<sup>1</sup> In the same way we may take as a basis for a definition of the civil law the function which the state discharges in enforcing the right of the individual to security of person, reputation and property, including therein the right of the state itself in its capacity as a property owner. The foundation of equity jurisdiction to-day is the enforcement of civil law; but if a court of equity enjoin an act injurious to the community as well as to an individual, its writ will in fact enforce both public and private rights. How far such jurisdiction serves to enforce the criminal law depends on the nature and importance of the public right involved; and while it may be difficult to draw exact lines, still we can be certain that so far as the court enjoins acts which are breaches of the peace, which violate public decency, which interfere with the operation of the government, or which violate governmental rules for the maintenance of freedom of trade, its jurisdiction is essentially criminal. For whatever the court's purpose may be, in effect its decrees enforce public rights of the community which overshadow the private rights involved.

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<sup>1</sup> Holland, *Jurisprudence* (7th ed.) 322; *cf.* 3 Bl. Com. 2.

Originally no such distinction or limitation was thought of; and the Court of Chancery in its earliest period designedly assumed jurisdiction to protect persons and property from violence. The reign of Richard II. found England in a turbulent and restless state. Politically it was a time of weak sovereigns; economically it was a period of transition and reformation. Manoral authority was breaking down and the power of municipalities and guilds was lessening. Highwaymen and rioters made trade and travel hazardous; powerful barons overawed the local courts.<sup>1</sup> No sharp line was drawn between executive and judicial powers, and chancellors, probably without stopping to analyze in what capacity, exercised the royal prerogative delegated to them by Edward III.<sup>2</sup> to relieve the poor and the weak. Thus many of the suits of this period, though involving property rights, in fact were instituted to preserve the peace and prevent crime.<sup>3</sup> The wide scope of this jurisdiction can best be seen from some of the complaints that were filed.

In 1388 we find a bill of John Biere against Roger Mule, Roger Treury and others, alleging that the defendants "came by night with force and arms" into the house of the said John and assaulted his servants and lay in wait for him so "that it behoved the said John to desert his said country," and besides they "detained the merchandise and goods" of the said John so that he could not conduct his business; and the "suppliant," as he was then called, prayed as remedy that the defendants be required to find surety that they would not harm him and that his goods be delivered to him.<sup>4</sup>

A few years later there is a petition or complaint of Thomas Saintquintyn against Roger de Wandesford, alleging that Roger and several other "evil-doers unknown, assembled from diverse parts, arrayed and armed as for war with the armor aforesaid," did "ambush themselves to kill and murder the said suppliant and his people," and further alleged that when the constables and bailiffs and servants and tenants of the suppliant interfered, the defendants "did set upon one Robert Spynes and Laurence of Bridlington . . . and did beat, maim and ill-treat them . . . and therefore the said suppliant hath lost the services of his tenants and servants."

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<sup>1</sup> See 1 Cunningham, *Growth Eng. Commerce* 335; Gneist, *Eng. Const.* 334.

<sup>2</sup> 22 Edw. III.

<sup>3</sup> A large number of instances are to be found in *Select Cases in Chancery*, Selden Society Publications, vol. x.

<sup>4</sup> *Select Cases in Chancery*, No. 5.

For all of which the said suppliant prayed "remedy in safeguard of the peace."<sup>1</sup>

An early form of combination in restraint of trade appears in a bill filed in 1397 by William Lonesdale, alleging that because he had sold his merchandise, to-wit, herring and other fish, at a less price than the other merchants of the town, Richard Suffyn and "other evil-doers, of their covin, lay in wait with force and arms to kill the said William, and assaulted and beat him."<sup>2</sup>

The jurisdiction to protect the rights of landowners is shown in a suit in the reign of Henry IV., where "Edmund Fraunceys grocer and citizen of London" alleges that he was seized of certain lands by livery on writ of execution, and that "by the maintenance and conspiracy of James de Clifford and Hugh de Byslee . . . no man or farmer of said County dare occupy or till the said lands and tenements to the use and profit of the said Edmund, through the strength, maintenance and procurement of the said James and Hugh," and the bill prays a writ directed to the sheriff and the justices of the peace to command James and Hugh that they shall "suffer the said Edmund . . . to occupy and till the said lands and tenements . . . without any intermeddling or disturbance."<sup>3</sup>

This jurisdiction, however, was always unpopular; and gradually, as the government became more stable and the courts of law more efficient, the need for a criminal equity lessened, and little by little the chancellor's criminal jurisdiction fell off, until finally toward the end of the fifteenth century its exercise ceased entirely.<sup>4</sup>

The King's Council had co-ordinate jurisdiction with the chancellor, and it relinquished its criminal jurisdiction more slowly. The Council had come to be called the Court of Star Chamber from the name of the room it occupied; and its jurisdiction was widely extended with salutary result in the disorderly times that followed the War of the Roses.<sup>5</sup> But its summary methods applied to the trial of crimes eventually became arbitrary and tyrannical, and the court became so odious that it was abolished by statute in 1645.<sup>6</sup>

The popular fear and dislike of the criminal jurisdiction of chancery undoubtedly contributed to the general distrust of the court,

<sup>1</sup> Select Cases in Chancery, No. 17.

<sup>2</sup> *Ibid.*, No. 23.

<sup>3</sup> *Ibid.*, No. 70.

<sup>4</sup> *Ibid.*, Introduction xxi.; 1 Spence, Eq. Juris. 688, 689; cf. 1 Story, Eq. Juris. § 48.

<sup>5</sup> 1 Spence, Eq. Juris. 350; Gneist, Eng. Const. 507 and note.

<sup>6</sup> 16 Car. I. c. 10.

and to the consequent opposition of the Commons which hampered even its civil jurisdiction.<sup>1</sup> It was not until the eighteenth century that the jurisdiction of the court became firmly fixed, and at that time it no longer made any attempt to enforce the criminal laws.

However, the court never ceased to assert its right to protect property from irreparable injury, even if the act involved were also a crime.<sup>2</sup> But the jurisdiction was sparingly exercised. The power to enjoin public nuisances seems to have lapsed in the time of Charles I., and was not brought forward again until 1795.<sup>3</sup> Libels, even if injurious to property rights, were not enjoined at all;<sup>4</sup> perhaps because it was feared the Commons would regard such a jurisdiction as an infringement of freedom of speech.<sup>5</sup>

Still, now and then injunctions were issued against criminal acts, for example against the publication of libelous letters because the plaintiff had a right of literary property in them,<sup>6</sup> and against the issuance of circulating notes in derogation of the coinage of a foreign state.<sup>7</sup> These occasional decisions preserved the nucleus of the jurisdiction from which the law of to-day has grown.

In the United States particularly the power of courts of equity has become greatly extended. One reason of this doubtless has been that the elective character of the judiciary has lessened popular distrust of judges. At the same time new problems of constitutional law and of municipal authority have raised new questions for courts of equity, and as a result have accustomed the people to the exercise of broad chancery powers. The more complicated relations of capital and labor, the severer struggle for existence, the growing tendency to the incorporation of business enterprises and the consolidation of corporations have given rise to new demands on the legal system; and the uncertainty of trials in criminal courts, due both to their fostering of technicality and the low standards of their juries, have made people turn for relief to courts of equity.

The interest of the public has been awakened by the injunctions issued in controversies between employers and organized labor;

<sup>1</sup> 1 Spence, Eq. Juris. 343-346; see 17 Rich. II. c. 6; Cary's Reports, Appendix.

<sup>2</sup> *Emperor of Austria v. Day*, 3 De G. S. & F. 217; *Macaulay v. Shakell*, 1 Bli. N. S. 96; *Prudential Ass. Co. v. Knott*, 10 Ch. App. 142.

<sup>3</sup> *Atty.-Gen. v. Richards*, 2 Anst. 603; see Kent, J., in 2 Johns. Ch. 382.

<sup>4</sup> *Gee v. Pritchard*, 2 Swanst. 402; *Prudential Ass. Co. v. Knott*, 10 Ch. App. 142.

<sup>5</sup> See *Trial of Scroggs*, 8 How. St. Tr. 162.

<sup>6</sup> *Gee v. Pritchard*, 2 Swanst. 402.

<sup>7</sup> *Emperor of Austria v. Day*, 3 De G. S. & F. 217.

but these writs represent only one phase of the modern interference of equity with criminal acts. In these cases the jurisdiction is exercised at the suit of a private individual seeking to protect a private right; beyond them are the cases where the state brings suit in order to prevent the violation of a right belonging to it in its public capacity. All the cases, however, in fact administer the criminal law; for the rights enforced in them include public rights of the community which are of much greater moment than the private rights involved. We can group the cases into three classes according to the nature of the public rights enforced.

1. Cases involving the preservation of the peace or the prevention of concerted action to injure property — such are the numerous cases growing out of labor controversies.

2. Cases involving the prevention of violations of public decency — such are suits to enjoin the maintenance of saloons or brothels.

3. Cases involving the protection of the public from combinations in restraint of trade.

1. The use of the writ of injunction to preserve the peace and prevent concerted action to injure property in labor controversies originated with the case of *Springhead Spinning Co. v. Riley*.<sup>1</sup> There the court enjoined striking workmen from posting placards to keep other workmen away; and although the case was afterwards strongly disapproved,<sup>2</sup> its example was followed. In America the doctrine has been liberally extended; and the courts have assumed jurisdiction to restrain acts of every kind intended to coerce employers by preventing workmen from taking the place of strikers. So injunctions have issued to restrain strikers from surrounding and following workmen, and ridiculing or menacing them;<sup>3</sup> from parading and displaying banners before a factory;<sup>4</sup> from maintaining a patrol to keep other workmen away;<sup>5</sup> from marching and countermarching and standing about the entrance of

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<sup>1</sup> L. R. 6 Eq. 551.

<sup>2</sup> *Prudential Ass. Co. v. Knott*, 10 Ch. App. 142.

<sup>3</sup> *Coeur d'Alene Mining Co. v. Union*, 51 Fed. Rep. 260; *Lake Erie & W. Ry. Co. v. Bailey*, 61 Fed. Rep. 491; *Consol. Steel & Wire Co. v. Murray*, 80 Fed. Rep. 811; *Davis v. Zimmerman*, 91 Hun, 489; *Shoe Co. v. Saxey*, 131 Mo. 212; *Bruschke v. Furniture Makers Union*, 18 Chi. L. N. 306; *Murdock v. Walker*, 152 Pa. St. 595; *Wick China Co. v. Brown*, 164 Pa. St. 449; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn.*, 59 N. J. Eq. 49.

<sup>4</sup> *Sherry v. Perkins*, 147 Mass. 212; *Beck v. Protective Union*, 118 Mich. 497.

<sup>5</sup> *Vegelahn v. Guntner*, 167 Mass. 92.

a place of work;<sup>1</sup> and even from conspiring to prevent the loading of a boat except by union men.<sup>2</sup> Relief has also been granted against acts by workmen intended to coerce employers by depriving them of a market for their goods, and thus boycotts have been enjoined.<sup>3</sup> The same principle applies to concerted acts of workmen to coerce other workmen into joining a union by interference with their employment; accordingly the Supreme Court of Massachusetts enjoined union workmen from circulating a black list of members of a rival union intended to compel their employers to discharge them.<sup>4</sup>

In all these cases the basis of the jurisdiction has been the prevention of irreparable damage for which there was no adequate remedy at law. Some few judges have been cautious and have required clear proof of the threatened irreparable damage and of the insolvency of the defendants;<sup>5</sup> but the power to issue an injunction if necessary was conceded even by them. The existence of a remedy by criminal action, however, has been so much overlooked that New York courts have held that if no violence be threatened — that is, if no breach of the peace be involved — an injunction cannot issue.<sup>6</sup>

Another line of similar cases of interference in order to afford protection in disputes between master and servant has arisen in receivership cases. An interference with property in the hands of a receiver, and therefore in *custodia legis*, is a contempt of court; and this principle has been applied to the choses in action and intangible property in the control of receivers, and thus has been extended to the relations of receivers with their employees. Naturally the wide applications of this doctrine have been in railway receiverships. It has been held to be contempt not only to interfere by violence with the operation of a railway in the custody

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<sup>1</sup> Mackall v. Ratchford, 82 Fed. Rep. 41; American Steel & Wire Co. v. Wire Drawers Union, 90 Fed. Rep. 608; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn., 59 N. J. Eq. 49.

<sup>2</sup> Elder v. Whitesides, 72 Fed. Rep. 724.

<sup>3</sup> Barr v. Essex Trade Council, 53 N. J. Eq. 101; Casey v. Typographical Union, 45 Fed. Rep. 135; Oxley Stave Co. v. Coopers' Union, 72 Fed. Rep. 695; Hopkins v. Oxley Stave Co. (same case on appeal), 83 Fed. Rep. 912. But see Sinsheimer v. Union Garment Workers, 77 Hun, 217.

<sup>4</sup> Plant v. Woods, 176 Mass. 492.

<sup>5</sup> Mechanics Foundry v. Ryall, 62 Cal. 416; s. c. 75 Cal. 601; Longshore Printing Co. v. Howell, 26 Ore. 527; De Pear v. Cook's Union, 27 Chi. L. N. 387.

<sup>6</sup> Rogers v. Evarts, 17 N. Y. Supp. 264; Krebs v. Rosentein, 66 N. Y. Supp. 42; 67 N. Y. Supp. 385.



of a receiver,<sup>1</sup> but even to order a strike with intent to hinder its management.<sup>2</sup> Likewise to make receivers more secure, writs of injunction have been issued for their protection, and thus employees of a railroad in a receiver's custody have been enjoined from refusing to haul certain cars,<sup>3</sup> and from interfering with workmen on the road, or conspiring to leave so as to cripple the road or by any device to hinder its operations.<sup>4</sup>

These injunctions preventing interference with the operation of a railway made it easy for the court to reach the Debs case.<sup>5</sup> For us that case is important, because it extended the issue of injunctions to preserve property from injury by violence to a suit brought, not at the instance of a private property owner or a receiver for whose protection the court was pledged, but by the government itself. The decision rests on the theory that the United States has a property interest in the mails, and that the stoppage of trains would injure this property right and would also be an interference with interstate commerce; but in fact the injunction restored the peace so that trains could be operated. Although the influence of the Supreme Court of the United States makes the Debs case universally accepted as law, still there has been no case directly following it, and it had no direct precedent to justify it, excepting possibly a bare *obiter* statement of the Supreme Court of Louisiana,<sup>6</sup> which is not even referred to in the opinion.

2. The same development, beginning with suits to protect the property of private persons and then extending to suits by the government itself, occurred in the cases brought to prevent violations of public decency. The jurisdiction rests on the power of the court to enjoin nuisances. In the narrow sense legal nuisances include injuries to lands caused by acts done on other lands, and also encroachments on or injuries to incorporeal hereditaments.<sup>7</sup> Obstructions of the public right of way in a street or a stream are public nuisances in this sense; and injunctions are granted against them because of the public property right involved. Even in these cases, however, the jurisdiction of equity developed slowly. Lord Brougham spoke of it "as of recent growth," and said that it "had not till very lately been much exercised, and had

<sup>1</sup> *In re Doolittle*, 23 Fed. Rep. 544.

<sup>2</sup> *In re Lennon*, 166 U. S. 548.

<sup>3</sup> *In re Debs*, 158 U. S. 564.

<sup>4</sup> See Langdell, 1 HARV. L. REV. 123.

<sup>5</sup> *In re Higgins*, 27 Fed. Rep. 443.

<sup>6</sup> *Arthur v. Oakes*, 63 Fed. Rep. 310.

<sup>7</sup> *State v. Fagan*, 22 La. Ann. 545.

at various times found great reluctance on the part of the learned judges to use it, even in cases where the thing or act complained of was admitted to be directly and immediately hurtful to the complainant."<sup>1</sup>

The term "nuisance" is also applied to anything causing serious inconvenience or annoyance, and in that sense the term "public nuisance" came to be applied to any place conducted so noisily or wantonly as to be a source of danger or annoyance to the neighborhood, such as a gambling-house or a brothel.<sup>2</sup> No property right of the public or of any considerable number of persons is involved in these cases; and the common law provides a remedy by writ of prohibition.<sup>3</sup> Nevertheless later judges disregarded the earlier limitations upon this jurisdiction, and not only began freely to enjoin injuries to public property, but even extended the jurisdiction so as to include public nuisances caused by indecent or disorderly conduct. The first injunctions were issued at the instance of private parties who sued because the disorderly character of brothels seriously impaired the value of their neighboring property.<sup>4</sup> The possibilities of this jurisdiction were subsequently taken advantage of by legislatures in states having prohibitory liquor laws.

It is well settled common law that the legislature may define public nuisances and may extend the definition so as to include new classes of cases.<sup>5</sup> Accordingly the legislatures of many states enacted statutes declaring saloons to be nuisances and providing for suits by the state to enjoin them. Many courts have been slow to sanction suits by the state to enjoin public nuisances of this character because no property rights were involved; and so in the absence of statutes they have refused to entertain bills filed by the state to enjoin gambling,<sup>6</sup> or the maintenance of saloons in defiance of prohibitory laws.<sup>7</sup> On the other hand, other courts of good standing have been quick to assume this jurisdiction, and even in the absence of statutes have issued injunctions at the instance of the

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<sup>1</sup> *Earl of Ripon v. Hobart*, 3 Myl. & K. 169.

<sup>2</sup> Bacon, *Abr. Title Nuisance*.

<sup>3</sup> Bacon, *Abr. Title Nuisance*; *Jacob Hall's Case*, 1 Vent. 169; *King v. Betterton*, 5 Mod. 142.

<sup>4</sup> *Hamilton v. Whitredge*, 11 Md. 128; *Cranford v. Tyrrell*, 128 N. Y. 341, 344.

<sup>5</sup> *King v. Gregory*, 5 Barn. & Ald. 555.

<sup>6</sup> *State v. Patterson*, 37 S. W. Rep. 478 (Tex.); *People v. Dist. Ct.*, 26 Col. 386.

<sup>7</sup> *State v. Crawford*, 28 Kan. 726; *State v. Schweickhart*, 109 Mo. 501.

state against the conduct of prize fights<sup>1</sup> or the evasion of liquor laws.<sup>2</sup> In the states where legislatures have enacted statutes declaring saloons to be public nuisances for the purpose of invoking this jurisdiction, injunctions have been unhesitatingly issued at the instance of the state;<sup>3</sup> and the Supreme Court of the United States has added its weight to sustain the doctrine.<sup>4</sup> In all these cases the courts do not seem to have appreciated that such suits merely enforce public order and decency; and consequently they have overlooked entirely the consideration urged by the Supreme Court of Texas that no threatened injury to the property or the civil rights of the state was involved, and that the mere fact "that the law against the offense is not enforced or observed is no ground for the interference of a court of equity."<sup>5</sup>

These decisions naturally have tended to make courts of equity careless of the traditional limitations of their jurisdiction, and the Supreme Court of Georgia has gone so far even as to enjoin the stealing of oysters from a bed owned by the state;<sup>6</sup> while the Supreme Court of Texas itself has sanctioned an injunction to prevent the alienation of a wife's affections.<sup>7</sup>

3. One effect of these injunctions was to accustom people to the suppression of crimes by courts of equity in cases where prosecutions at law were ineffective; and under circumstances that remind us of the time of Richard II., when his nobles overawed the local courts, legislatures have invoked the aid of courts of equity to prevent injuries to the public by wealthy and influential corporations. As precursor of this jurisdiction there is a solitary case in Delaware where an injunction issued against the abuse of a privilege of a lottery.<sup>8</sup> The great step forward came much later when consolidations of competing railway lines were enjoined at the instance of the state.<sup>9</sup> The decisions all rest on the ground that the consolida-

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<sup>1</sup> *Columbian Athletic Club v. State*, 143 Ind. 98; *State v. Olympic Club*, 35 La. Ann. 935 (*sem.*); *State v. Hobart*, 8 Ohio N. P. 246.

<sup>2</sup> *State v. Fegar*, 29 S. E. Rep. 463 (Ga.).

<sup>3</sup> *Ellenbach v. Plymouth*, 69 Ia. 240; *State v. Jordan*, 72 Ia. 377; *Carleton v. Rugg*, 149 Mass. 550; *State v. Saunders*, 66 N. H. 39; *State v. Durevin*, 46 Kan. 695; *State v. Markinson*, 5 N. Dak. 147; *State v. Mitchell*, 3 S. Dak. 223.

<sup>4</sup> *Ellenbach v. Plymouth*, 134 U. S. 31; *Kansas v. Ziebold*, 134 U. S. 531.

<sup>5</sup> *State v. Patterson*, 37 S. W. Rep. 478 (Tex.).

<sup>6</sup> *Jones v. Oemler*, 110 Ga. 202.

<sup>7</sup> *Ex parte Warfield*, 50 S. W. Rep. 933.

<sup>8</sup> *State v. Maury*, 2 Del. Ch. 141.

<sup>9</sup> *Penn. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 374 (Pa.); *Trust Co. of Ga. v. State*, 109 Ga. 736; *L. & N. R. R. v. Commonwealth*, 97 Ky. 675; affirmed 161 U. S. 677; *Stockton Atty.-Gen. v. Central R. R. Co.*, 50 N. J. Eq. 52.

tions would be *ultra vires*, but the courts recognized that the acts were objectionable because they violated statutory or constitutional provisions which established the policy of the state; and the Supreme Court of Georgia laid down the rule that the state can sue not only where its property is involved, but also where "the public interests are threatened and jeopardized."<sup>1</sup> On somewhat similar lines an injunction was granted at the suit of an oil inspector to prevent the fraudulent marking of oil as inspected,<sup>2</sup> and injunctions have issued at the instance of municipalities to enjoin the unlawful erection of telephone poles<sup>3</sup> and the improper laying of street railway tracks.<sup>4</sup>

The Congress of the United States has also invoked this jurisdiction to prevent violation of the interstate commerce law and unlawful combinations in restraint of trade. The Interstate Commerce Act provides that in event of any disobedience of an order of the interstate commerce commission not founded on a controversy requiring a jury trial under the Constitution, the commission may apply in a summary way for relief by petition to the circuit court sitting in equity, and that the court shall then determine the matter speedily and on short notice.<sup>5</sup> The Supreme Court sustained this jurisdiction without discussion, undoubtedly assuming that the violation of the Interstate Commerce Act did not require a trial by jury and that a court in equity could enforce the law.<sup>6</sup>

The same broad use of equity powers is provided for in the Sherman Act prohibiting monopolies and combinations in restraint of trade.<sup>7</sup> The Supreme Court held that the United States could sue to declare combinations in restraint of trade void and to enjoin combinations to fix rates or monopolize traffic; and it answered the objection that the United States had no interest to maintain a suit, in the following language: "Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy."<sup>8</sup>

<sup>1</sup> Trust Co. of Ga. v. State, 109 Ga. 736.

<sup>2</sup> Young v. Emery, 155 Pa. St. 273.

<sup>3</sup> Utica v. Utica Tel. Co., 48 N. Y. Supp. 916.

<sup>4</sup> Shamokin v. Elec. Ry. Co., 196 Pa. St. 166.

<sup>5</sup> Act of Mar. 2, 1889, § 5.

<sup>6</sup> T. & P. Ry. Co. v. Inter. Com. Commis., 162 U. S. 197; Inter. Com. Commis. v. B. & O. R. R., 145 U. S. 264; see D. C. H. & M. Ry. v. Inter Com. Commis., 74 Fed. Rep. 803.

<sup>7</sup> Act of July 2, 1890.

<sup>8</sup> U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290.

How far this doctrine goes, even in its application under this anti-trust legislation, can best be seen by examining the bills of complaint in the recent "railway merger" and "beef trust" cases. In the railway merger case the complaint prays that the court "decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are *in derogation of the common rights of all the people of the United States* and in violation of the Act of Congress of July 2, 1890 . . . and that the defendants . . . be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same."<sup>1</sup>

In the beef trust case the complaint alleges that the defendants "do and will artificially restrain such commerce . . . all to the manifest injury of the people of the United States and in defiance of law," and the prayer is that they be enjoined "from continuing each and any of the *unlawful* proceedings aforesaid."<sup>2</sup>

In each of these three classes of cases we thus mark the same development — the jurisdiction began with suits to prevent injuries to private property by criminal acts, and then gradually extended to suits brought by the state itself to enforce its rules laid down for the public good. In all these cases, however, the real purpose of the suit is not to determine whether the plaintiff has rights that ought to be protected from injury, but to prevent the defendant from violating unquestioned rights. The principle on which courts of equity enforce summary punishment for contempt is that the real controversy in the case is the right to the injunction, and that in order to make the adjudication of that controversy effective the court will take summary measures to enforce obedience to its writ. The situation becomes very different when the right to the injunction is conceded, and the only issue that can be raised will be whether or not specific acts committed after entry of the decree violate that injunction. Then the court is no longer using its power of punishment to make its adjudications of controversies effective; but it is making its process of contempt a means for a summary enforcement of the administrative law.

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<sup>1</sup> U. S. v. Northern Securities Co. *et al.* now pending in U. S. Circuit Court of Minnesota.

<sup>2</sup> U. S. v. Swift *et al.*, now pending in U. S. Circuit Court for Northern Dist. Illinois. Demurrers to the complaint were overruled and a temporary injunction ordered February 18, 1903.

Justice Field of Massachusetts demonstrated this in a dissenting opinion where he says:

"The issue of the injunction adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process employed by courts of equity in punishing persons guilty of wilful violation of injunction. There can be no decree for damages, or for a penalty, or directly affecting the title or condition of the property."<sup>1</sup>

Justice Dargan of Alabama based a decision on similar grounds in 1848 in a suit brought by a railway company to enjoin a landowner, part of whose lands the company had condemned, from molesting the employees of the company in the building of its line.

"The courts of law have complete jurisdiction to punish the commission of crime, and can interpose to prevent their commission by imprisoning the offender or binding him over to keep the peace. But equity has no jurisdiction over such matters, at least a court of equity cannot entertain a bill on this ground alone. If the bill had shown any doubt in the title of the company, arising from the wrongful act of the defendant, after the company had done all they could under the statute to give them the right-of-way, perhaps the bill might have been sustained to remove the doubt or perfect their title. But under the allegations of the bill, the title of the complainants is perfect; and the only ground of equity being to restrain the defendant from doing personal violence to the agents of the company in constructing and using the railroad, and from obstructing illegally said company in the prosecution of their work, the chancellor properly dismissed the bill."<sup>2</sup>

This reasoning becomes much more cogent when the application for protection from violation of the rules of government is made, not by an individual whose property may be damaged, but by the government itself for the purpose of protecting the public at large.

It is beyond question that the exercise of this jurisdiction has been remarkably effective. It has protected workmen from violence; prevented interference with the operation of railways and mines; suppressed prize-fights, gambling-houses and brothels; and it has at least made cautious corporations combining in restraint of trade. A large number of adjudications have established the practice; and the issue of such injunctions is now so much a matter of course that many courts would probably not even listen to an argument in opposition to the jurisdiction. But the well fixed

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<sup>1</sup> *Carleton v. Rugg*, 149 Mass. 559.

<sup>2</sup> *Montgomery v. Walton*, 14 Ala. 207.



character of the jurisdiction and the beneficial results of its exercise tend to make us overlook its shortcomings and the dangers that lie hidden beneath it. For whatever be the name or form we give to the proceeding, such injunctions do in fact administer the criminal laws, and in bringing the procedure of courts of equity to the establishment and punishment of crimes they violate fundamental principles of our jurisprudence. Judges have justified the jurisdiction in these cases on the ground that there was no adequate remedy provided at law. The inadequacy of remedy at law, however, was due not to the lack of a method of procedure, but to the failure properly to enforce that procedure. An injunction of a court of equity does not in itself physically prevent an unlawful act. It is merely a mandate of the court forbidding the act. In every one of these cases the same prohibition had already come from the legislature, and the statutes provided punishment for violation of the legislative prohibition more severe than any punishment that could have been inflicted for contempt of the prohibition of the court. Boycotts, violent strikes and combinations deliberately designed to injure another in his business are every one of them punishable at law as criminal conspiracies — combinations of two or more persons to do an unlawful act.<sup>1</sup> Likewise every criminal code provides punishments for those who make a place a public nuisance because public statutes are “openly, publicly, repeatedly, continuously, persistently and intentionally violated there” — the ground on which the Indiana Court sustained an injunction.<sup>2</sup>

Justice Brewer quotes the leaders of the strike at Chicago as saying that the strike was broken, “not by the army and not by any other power, but simply and solely by the action of the United States courts in restraining us.” Yet these injunctions were disobeyed; and it was not until troops were marshalled and rioters were apprehended by force that order was restored. True, the courts inflicted summary punishment for contempt, but fear of that punishment did not become a deterrent from crime till it had behind it the strength of the army. It was really martial law that restored the peace at Chicago. The injunctions were effective only because they furnished a method of summary trial. The same

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<sup>1</sup> *Commonwealth v. Hunt*, 4 Met. (Mass.) 111; *State v. Glidden*, 55 Conn. 46; *State v. Stewart*, 59 Vt. 273; *U. S. v. Pettibone*, 148 U. S. 197; *People v. Sheldon*, 139 N. Y. 251; *State v. Huegin*, 110 Wis. 189. See 21 Am. L. Rev. 41.

<sup>2</sup> *Columbian Athletic Club v. State*, 143 Ind. 98.

result could have been attained in the same way through courts martial.

We prohibit courts martial and guarantee to those accused of crime trial by jury under constitutional safeguards, because our history has proved that the dangers of abuse of authority through methods of summary trial are evils that cannot be compensated for by the greater efficiency the system produces. Summary trials based on injunctions to prevent crime have been effective in maintaining the peace in the same way that the criminal jurisdiction of the Court of Chancery was effective in the reign of Richard II.; and the jurisdiction is arousing the same opposition that the Court of Chancery had to contend with until well into the eighteenth century. It is doubtless true that many leaders of labor unions oppose injunctions because the prevention of violence frequently terminates strikes, but the public at large who have been aroused by these injunctions are not actuated by any desire to destroy the peace. They themselves do not analyze the grounds of their opposition, but it really is a vague feeling that traditional safeguards are being encroached upon, and with this there is a growing apprehension of one-man power. The people do not discriminate between the procedure of courts of law and courts of equity — they feel only that the government is punishing unlawful acts by methods contrary to the traditional law. We can find a reason for this in the original charters of liberty. They make no distinction as to procedure, but they guarantee that “no freeman shall be taken or imprisoned . . . or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers or by the law of the land.”<sup>1</sup> It is this feeling that had brought forth the movement toward legislation requiring jury trials in cases of contempt. Courts of equity act *in personam*, and their adjudications of controversies are effective only because of the certainty of summary punishment for contempt. To permit the inevitable uncertainties of jury trials in such proceedings would undermine the entire strength of the system. The remedy must be applied not to the enforcement of injunctions, but to the jurisdiction to issue them; and unless the issue of these injunctions be restricted ill-advised legislatures yielding to popular clamor may seriously impair our judicial system by curtailing the power of punishment for contempt.

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<sup>1</sup> Magna Charta, § 39. See 1st Chart. H. III., § 32; 2d Chart. H. III., § 35; Petition of Right (3 Car. I. c. 1), § 3.

In view of the large number of adjudications the courts themselves can now do but little; and remedy must be sought through legislation. Relief can be had by merely enacting that a writ of injunction shall not issue to enjoin any act the commission of which would be either a felony or a misdemeanor, and by repealing any existing statutes authorizing suits in equity by the government itself to prevent violation of its rules enacted for the public good, such as the suits to enjoin restraints on trade or the maintenance of gambling-houses or saloons. It is true that in the cases involving monopolies, the public has welcomed this jurisdiction because it has been effective in coping with offenders too powerful or influential to be reached by the criminal courts; but sooner or later the exercise of such jurisdiction leads to abuse, and eventually it must weaken the influence of the court just as it did in the fifteenth century. The result of such legislation would not be anarchy. The difficulties we now suffer from in criminal trials are due largely to the weakness of prosecuting attorneys and executive officers, and the low standard of intelligence of our juries. If we were brought face to face with the problem of maintaining order only by means of the criminal courts, though the process might be slow, the final result would be that our criminal prosecutions would be made effective; at the same time courts of equity would be freed from the danger of arousing popular opposition to their procedure by their enforcement of the criminal law.

*Edwin S. Mack.*

MILWAUKEE, February, 1903.

## APPORTIONMENT OF INCOME.

**I**N the management of a trust fund there often arise questions of apportionment of income. The subject is not a large or important one. It seldom gives cause for litigation. In some form or other however the question comes up every day. It arises whenever a trust account is closed. And at such times it is necessary, and at other times often convenient, to run over the whole subject and apply the law to the various investments contained in some trust or other fund. Sometimes one has to audit an old trust account, and the staleness of the facts in such a case causes questions of apportionment to arise in forms difficult to answer. While the problem may merge into questions between capital and income, it is ordinarily distinct from them, and its concrete form is not "Is this income?" but "Whose income is this?"

The old idea that rent or income came due not from day to day, but all at once when it could be collected, was the product of the uncertainties of its time. The modern trend, the result of modern certainties, has made the conception of income something which is earned from day to day, — a reward for daily abstinence, as the economists would say. And wherever income comes in regularly enough to make it possible, the tendency to-day is to apportion it as a matter of equity unless some special difficulty exists.

The question should always be approached from a reasonable point of view. Accountants will frequently urge one to refine upon it and reduce it to a mathematical question. Over-conservative trustees will constantly be inclined to apply an unintelligent rule of thumb for their own convenience. Between these two extremes, it would seem that the rule of law should be based upon the kind of accounting which a prudent business man, thoroughly up to date in methods of audit and account, would employ as to his own investments.

The question may arise

- I. Between buyer and seller.
- II. At the commencement of a trust or fund.
- III. On purchase or sale for a trust account.
- IV. At the end of some life or other interest in a fund.

## I. BUYER AND SELLER.

Questions often arise about the division or apportionment of the income or profits of a thing bought or sold. Of course, if the parties think of the point at the time, they are likely to cover it; but often they do not, and often, as in stock-exchange transactions, they are in a hurry and prefer to leave the point to the general rule of law or to some particular custom. In buying and selling, then, the rule of apportionment is purely one of conventionalized intention. But it is valuable in connection with the other questions to be discussed later, because the question for decision in cases which call for the application of such a rule, is often whether and when the income in question has ceased to be an incident of the principal thing. And the discussion of such a question turns upon general principles of apportionment. Common specific cases are:

**RENT.** — This passes by a grant of the lessor's interest, unless overdue. But where that grant puts an end to a tenancy at will, the seller loses his portion of the rent.<sup>1</sup>

**TAXES.** — These become a lien and incumbrance on a day certain (in Massachusetts May 1st). A mere transfer of the seller's interest after that day leaves the lien on the buyer. For the land is the true debtor for the tax, and the liability of the owner is only secondary.<sup>2</sup>

**INSURANCE.** — This does not pass as incident.

Usually, however, rent, taxes, and insurance are apportioned by special agreement, as may be seen by consulting any common blank form for the purchase and sale of real estate.

**COUPONS.** — Where a bond is not in default, the purchaser gets the current unpaid coupon. Where it is in default, he gets all unpaid coupons unless special circumstances exist. There are two customary ways of quoting prices for bonds, "flat" and "and interest." "Flat" means that a lump sum is paid for the bond, coupon on; "and interest" means that the price is settled, and in addition accrued interest is adjusted *pro rata*. In a place, if any exists, where neither custom is known, I presume a sale where nothing was said would be assumed to be a sale "flat." In the New York Stock Exchange prices are "flat," in the Boston Stock

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<sup>1</sup> Hammond v. Thompson, 168 Mass. 531.

<sup>2</sup> Swan v. Emerson, 129 Mass. 289.

Exchange "and interest," which leads to some differences commented on later in this article. "On the Curb" in New York the sales are "and interest." For obvious reasons bonds in default are presumed to be sold "flat," even when the general custom is otherwise.

INTEREST. — Interest not represented by a coupon or specialty passes as incident to the debt in the absence of agreement.

DIVIDENDS. — These "go off" or cease to pass as incident on the day of declaration, unless the corporation fixes a day for them to go off by voting that they are to be paid to stockholders who were or shall be such on a fixed day. In such a case this day, if after declaration of the dividend, governs.

## II. INCOME ACCRUED AT THE COMMENCEMENT OF A TRUST.

A conveyance, devise, or bequest of specific investments must be interpreted to ascertain whether accrued income is intended to be conveyed to the life tenant or beneficiary. In the absence of any evidence of such intention some general rule should be applied. And it would seem fair, if there is no expression to the contrary, to suppose that a person, who owns an income-producing investment and conveys or devises it, has in mind, by the use of the word "income," that which he knows will be the increment of the fund. A giver by deed should not in fairness, and a giver by will cannot, turn Indian giver and demand back something which passes naturally as incident to the gift. Nor is there any reason to believe that such a giver intends to capitalize what is in its nature income.

The law is that any specific or residuary gift carries with it income from the date of conveyance or death. The income is not to be deferred to the date when the estate is or ought to be settled. While the law is clear, executors are not accurate about this, and a trustee taking over assets from an executor (or where trustee and executor are one, some representative of the life tenant) will generally get a fairly profitable result from overhauling the executor's account on this point.

It should be noted, however, that a life tenant who is entitled to the income of a residue from the date of death is entitled, according to some decisions, only to the income of the net residue, and not to the income of the gross residue. Where the debts are small, this rule calls for inconvenient and annoying accounting with no



profitable result, but in a large and involved estate it would seem to be necessary and just that the life tenant should bear in some form the interest on the debts which balance and have probably enabled the purchase of the investments. The rule stated in the cases is that such a portion of the capital as with its income for one year will pay debts, legacies, and charges, shall be applied to that end, and the remaining portion or fraction of the principal is the net trust capital, while the remaining fraction of income and no more is the net or true trust income.<sup>1</sup>

This rule was applied to a case where the residue produced 15% income, and where therefore the life tenant would have preferred to be charged with the debts as of the day of death, and get the margin of 9% or more over the statutory rate of interest. Generally, of course, the statutory rate is greater than the trust rate and the life tenant gains slightly.<sup>2</sup>

An annuity charged on the residue is chargeable on the income of the residue from the first. But it would seem that a direction to purchase an annuity is a legacy of the cost, and in the absence of a contrary intention should be treated as if payable at the time when other legacies are due.

All income which is due and payable at the date of a death — that is to say, such matters as in the case of a sale would not pass as incident to the thing sold — becomes part of the principal. This rule generally works some hardship, and it should be guarded against in drawing wills where the difficulty is likely to arise. In the case of a husband who leaves his property in trust for his wife, there ought to be, in addition to the gift in trust, an outright legacy of a sum sufficient to represent the amount of income which a prudent woman should have on hand as a working balance. The average testator has cash in bank which is income, and does not mean to capitalize it. The writer knows of one case where the money upon which a husband and wife expected to live for the ensuing year was technically in hand at the date of the husband's death and so was capitalized. The result was to cripple the widow's finances severely, just when the contrary would have given needed ease and comfort.

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<sup>1</sup> *Allhusen v. Whittell*, L. R. 4 Eq. 295 (1867).

<sup>2</sup> *Lambert v. Lambert*, L. R. 16 Eq. 320 (1873).

### III. APPORTIONMENT IN THE PURCHASE AND SALE OF INVESTMENTS DURING THE TRUST.

In general, wherever income would pass with a thing sold or come with a thing bought, it is held that it is lost to, or gained by, the life tenant when the trustee sells or buys.

A prudent trustee ought, however, so to frame his bargains that injustice will not be done to either party; and where, as in Massachusetts, the test of his duty and power is his reasonableness and prudence, it would seem that he ought to be upheld in so framing his accounts that the substance of the transaction will be there represented fairly.<sup>1</sup>

Suppose that one should desire to-day to sell for a trust a block of the first mortgage bonds of the so-called "Atchison" railroad. These are freely dealt in in New York and in Boston on the Exchanges. In New York they sell "flat;" in Boston, "and interest." The best way to sell such bonds is to give a broker an order to sell for a fixed price and interest, and to authorize him to execute the order through his representatives in either Exchange, giving it to each according to the custom of his Exchange, but at substantial equivalents. Thus the advantage of both markets is obtained. On a block of \$10,000 the difference between a sale "flat" the day before and the day after the coupon is due will make a difference to the life tenant of \$200, if no apportionment is made. And it would seem clear that whichever way a sale is made it ought to be apportioned and settled in the trust accounts as a sale "and interest." Guaranteed stocks, income bonds, and other like securities ought to be treated in the same way. The writer is informed, however, that the practice (where there is anything definite enough to deserve the name) is often otherwise; and that some prominent trustees even instruct their brokers to return to them only the net sale, or purchase "flat," whatever the form of the transaction with the other party. This is done, perhaps, because of the economy of bookkeeping, as it reduces the three entries of principal, commission, and interest to one. The result in any particular case seems grossly unfair, and the writer has heard of a case where a trustee designedly

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<sup>1</sup> Compare *New England Trust Co. v. Eaton*, 140 Mass. 532, where a testamentary trustee without special powers in the will was sustained in apportioning bond premiums between capital and income.

sold stocks and bonds flat just "ex dividend" or coupon, and bought others flat just before dividend or coupon day with the express purpose of favoring the life tenant. On the other hand, in ten years of accounting by an honest trustee the net result would probably balance, and it would not be worth while to disturb his accounts.

A like point arises where rights accrue to stock to subscribe at a profit to other stock. The rights themselves, if sold, are capital. However, if they should be sold and new stock of the company bought with the proceeds, dividends would begin at once. If the trustee subscribes under them a delay occurs and he commonly loses two dividends before he gets full stock on the new subscription. It would seem fair that the equivalent of the lost dividends, or at least interest on the money which is not producing dividends, should be paid to the life tenant and charged up as part of the cost of new stock. So far as the writer knows of any practice in trust accounts, it is the other way. The stock market, however, faithfully represents this fact in comparative values. That is to say, the investor pays at least enough less for the rights than for the equivalent stock to balance this loss of dividends.

A point, perhaps chiefly of interest between principal and income, is worth speaking of under this head because of the question when the thing, if income, falls due. In the reorganization of more than one western railroad some interest, at least, was earned on first mortgage bonds during the receivership, but was applied to capital expenditures, and a part of the new securities given at the reorganization in exchange for old ones was specifically declared to be in exchange for coupons overdue.

In the Atchison "Plan" of 1895, page 3, the Adjustment Bonds are declared to be given (to the extent of 40% of the principal of old General Mortgage Bonds) in adjustment as follows: "25% for balance of principal of the General Mortgage Bonds (only 75% was given in new General Mortgage Bonds). 8% for accrued interest to July 1, 1895. 7% as compensation for reduction of fixed charge, and the non-cumulative feature for five years." The footnote giving this detail does not appear in all copies of the plan which the writer has seen, but the text states that "the coupons on the present General Mortgage Bonds are funded to July 1, 1895" (p. 3), and calls for the deposit of bonds with coupons representing interest from July 1, 1893 (p. 19); and from these two statements the same inference must be drawn. The St. Joseph & Grand Island Ry.

plan of 1896 gives 25% face value second preferred stock of the new company in return for coupons on old firsts. The old bonds bore interest at 6%, and were paid interest up to Nov. 1, 1893. The new bonds, bearing 2-3-4%, bore interest from Jan. 1, 1897, at the rate of 2% for the first two years. The loss was coupons for a face value of 19%. The new second preferred stock had not any considerable market value. That is to say, in the one case valuable adjustment bonds, in the other second preferred stock was given to the security holder in respect of, and because of income which had been impounded for purposes of the reorganization. The Boston trustees about whose action the writer has known sold eight-fortieths of the Atchison Adjustment Bonds received, and paid the proceeds to the life tenant. What, however, should have been the course of a trustee whose life tenant died pending the reorganization? The old coupon interest became due from day to day, and was apportionable (see below); but it was not paid except as part of the general settlement of the reorganization. When did it accrue as income? As the coupons became due? On deposit (when other interest was adjusted in cash)? When the plan became operative? It would seem that here, as some of the older members of the Suffolk Bar sometimes reply to their juniors, "The answer to those questions is a bill for instructions."

In the case of a compromise of a claim involving interest and principal, it would seem that a trustee ought to take a set of present value tables at the fair rate of trustee interest, fix the date or dates when the money ought to have been paid, ascertain the sum which then invested would have produced the amount received and divide *pro rata* the interest among the persons entitled to the income of the intervening period.<sup>1</sup>

If the interest in the claim ran at 6% there might be a case for adjusting interest at that rate. Another mode is to make up the claim at its face values of principal and interest, and divide the settlement money in like proportions.

#### IV. APPORTIONMENT AT THE END OF LIFE INTEREST.

The real problem in apportionment is met on the death of the life tenant when a mixed fund has to be considered. The adjuster should have before him a memorandum of dates and facts, *e. g.*, "John Doe died June 1, 1902, at 9 A. M., having a life interest

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<sup>1</sup> *Maclaren v. Stauton*, L. R. 11 Eq. 382.

under a trust fund, created by will (or deed) on April 1, 1860, by Richard Roe. The exact language creating the life estate is," etc.

FORMS OF INCOME IN QUESTION. — Interest grows due from day to day and is apportionable.<sup>1</sup> But an exception is made where the interest is represented by a separate specialty, *e. g.*, a coupon.<sup>2</sup> It is not then apportionable at common law.

Where the coupons are in ordinary form, at common law they are not apportionable.<sup>3</sup>

In Massachusetts, prior to Jan. 1, 1902, coupons were apportionable if in a trust created by will, but not if in a trust otherwise created.<sup>4</sup>

The Revised Laws removed this anomaly Jan. 1, 1902.<sup>5</sup> *Quaere* as to whether the dates of the statutes or the date of the instrument should determine.

COUPONS NOT IN USUAL FORM. — Atchison Adjustment Bonds<sup>6</sup> may be taken as an example. The interest is cumulative. No interest is payable except when and as declared in October by the directors out of a year's business ending July 1. It is clear that there is no certainty of any declaration of interest, nor that at the date of the death of the life tenant any net earnings exist and are applicable which may not be swept away by subsequent net losses. It would seem then that where the life tenant dies after July 1, the interest is fixed and should go to his estate, while if he dies before July 1, it is at least uncertain whether his estate can claim anything.

Kansas City, Memphis & Birmingham Income Bonds furnish another illustration. This mortgage defines net earnings, and requires payment of interest out of them, with a proviso or condition subsequent that the directors shall adjudge the earnings to be sufficient, and authorize the payment. It would seem that this is in the nature of a dividend, and not apportionable if declared, after a life tenant's death, for a period during part of which he was not living. The interest is not cumulative. Since the guarantee of these coupons by the St. L. & S. F. Ry. Co., it would seem that they are like other bonds.

<sup>1</sup> *Dexter v. Phillips*, 121 Mass. 178.

<sup>2</sup> *Clark v. Iowa City*, 20 Wall. 583-589; *Dexter v. Phillips*, 121 Mass. 178; *Adams v. Adams*, 139 Mass. 449. In Massachusetts otherwise by statute cited below.

<sup>3</sup> *Clark v. Iowa City*, 20 Wall. 583-589.

<sup>4</sup> Pub. St. c. 136, sec. 25, enacted May 10, 1848, as c. 310, sec. 2 of A. & R. of 1848.

<sup>5</sup> See R. L. c. 141, § 25. <sup>6</sup> The mortgage is in *Com. & F. Chronicle*, 62, p. 739.

**DIVIDENDS. — General Provisions.** — The decisions of the courts have dwelt on and given importance to the dates of four circumstances.

1. Date of declaration.
2. The specific period, and especially the date of its end, in respect of which payment is made, *e. g.*, "for the quarter ending July 1st."
3. The date when a dividend "goes off" the stock, *i. e.*, the date after which a transfer does not carry the dividend as incident to the stock.
4. Date of payment.

It is specially to be noted that these facts may occur in almost any order of time.

1. The date of declaration is always obtainable, although sometimes after lapse of time hard to get at except on the corporate records.

2. In the case of a cumulative preferred stock not in arrear one can be certain of the period in respect of which it is declared. But elsewhere this is often impossible, the directors simply declaring "a dividend" and designedly omitting the period (perhaps because in what would naturally be the period they did not earn the dividend declared). In such cases one can sometimes get a pretty definite statement of the real period at the office of the company. Dividends on preferred cumulative stock in arrears are sometimes declared in respect of the earliest period as to which there are arrears, sometimes in respect of the current period; and sometimes (as if to plague the trustee) as simply "a dividend."

3. The dividend goes off the stock as between buyer and seller as soon as declared, unless the company in its declaration fixes a date on which it shall go off. Sometimes this date is previous to the declaration, in which case it does not go off until declaration. In auditing old accounts it is sometimes hard, without access to corporate records, to get the date when the dividend goes off.

4. Dividends may be declared to be paid at the treasurer's convenience, but they are generally declared to be payable on a day certain. Sometimes after such declaration (perhaps to avoid an injunction) the treasurer is authorized to, and does anticipate payment.

If the life tenant dies prior to the declaration and prior to the



end of the period, or if no such period is named, the remainder-man gets the whole dividend.<sup>1</sup>

If the life tenant dies (1) after the declaration but (2) before the end of the period (3) before the date when the dividend goes off and (4) before payment, it would seem clear that his estate cannot have the whole dividend, because a portion of the period for which the dividend was declared was after his death. Justice would seem to suggest that it be apportioned. But apportionment of dividends in the absence of statute may be difficult, even where as in this case they have ceased to be uncertain. It would seem more likely that the remainder-man would get the whole, partly on the grounds urged in *Foote Appellant*,<sup>1</sup> partly because the dividend is payable to stock which at the important times has come to be owned by the remainder-man, and partly because it is at the date of death still uncertain. Payment of the dividend may fail or be enjoined.

If the declaration is in respect of a definite period ending before death, this fact is controlling. The declaration itself and other matters may all be after death. This was decided in *Johnson Ex'or v. Bridgewater Co.*<sup>2</sup>

This decision would seem to apply to arrears on cumulative dividends, and to income bonds where the income period is fixed, and to be much broader than is generally assumed.

The absence of a specific period presents more difficulties. Suppose such a dividend declared January 1, then the life tenant's death January 15, the dividend payable to stock of February 1, and payable March 1, and no specific period named in respect of which it is to be paid. This would seem to be *debitum in praesenti solvendum in futuro*, and to be probably, although doubtfully, the life tenant's. If the death were February 15th there would be little or no doubt that it was the life tenant's.

The general rule is that the dividend goes to the holder at the date of declaration. The application of these suggestions and rules to cumulative income bonds or preferred stocks will produce some astonishing results. For instance, a life tenant may die in 1890 and if arrears of preferred stock dividends are heavy and are paid up first, the remainder-man may not get anything for ten years or so. If current dividends are paid first, the administrator of the life tenant may get a plum ten years or so after his intestate has died.

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<sup>1</sup> *Foote Appellant*, 22 Pick. (39 Mass.) 299, 304.

<sup>2</sup> 14 Gray, 274.

And how are he and the trustee to settle their respective accounts until the transaction is over?

RENT. — Rent is not apportionable at common law.<sup>1</sup> In Massachusetts the statute above cited makes it apportionable. In the usual case rent grows due from day to day or is for an annual period. But what is one to say to a Bar Harbor or Newport lease with rent payable June 1 and September 1, when every one knows that in substance the whole year's rent is earned between June 1 and October 1? In such a place a lease for sixteen months — say the period from June 1, 1902, to Oct. 1, 1903 — can be and sometimes is written reserving two years' rent. Should a life tenant who dies May 1, 1903, eleven months after the beginning of the term, but before the second season, have eleven-sixteenths of the rent for the two seasons?

In England rent payable in advance is not apportionable.<sup>2</sup> The Massachusetts statute would seem to provide that it is, and certainly all income paid in advance for a specific period ought to be held to be apportionable over that period. The question, of course, is — what will happen to the trustee if he pays the life tenant immediately on receipt, as he often does? The answer is, he ought not to pay immediately.

PROFITS OF BUSINESS. — Partnership articles usually contain a withdrawal clause and a settlement clause. Where trustees are authorized to be partners they ought certainly, where feasible, to adjust the articles so that they will be fair in the event of the death of a life tenant. All withdrawals payable should represent the fair and certain increment from week to week or month to month, and withdrawals payable before the death should go to the life tenant. The profit-taking period ought to be a fair one (yearly generally because of the effect of seasons on profits), and extra profits or losses ought to be reckoned as accruing at that time. Any excess of withdrawals over accruing profits, except such as is accidental, ought to be stopped at once.

OUTGO. I. *Taxes*. — In Massachusetts taxes are not apportionable. They accrue May 1st in respect of the following twelve months,<sup>3</sup> and should be charged to the person who is entitled to the income on that day.<sup>4</sup>

<sup>1</sup> Com. Dig. Tit. Rent. *Dexter v. Phillips*, 121 Mass. 178.

<sup>2</sup> *Ellis v. Rowbotham*, [1900] 1 Q. B. 740.

<sup>3</sup> *Inhabitants of Southborough v. Inhab. of Marlborough*, 24 Pick. 166.

<sup>4</sup> *Holmes v. Taber*, 9 Allen (Mass.) 246 (1864).

As tax bills are not received or payable until autumn, a prudent trustee ought not to account with his life tenant during the summer without reserving a safe margin. It is respectfully submitted that the above ruling is archaic, and ought to have been covered by the statute which made rents apportionable, since rents and taxes are yearly and certain entries on one and the same account. The state of the law raises the question whether a trustee buying or selling taxable real estate ought to have the taxes apportioned to the date of transfer. That is the usual custom of prudent men. And if he had the power to apportion taxes on death, a trustee should follow that custom. The peculiar state of the law seems to work a hardship in permitting the life tenant to have the rents only up to the day of his death when he is required to pay the tax bills for the entire year if he is alive on May 1.

II. *Insurance.* — Insurance premiums are apportionable. This has the most obvious fairness. The death divides a term. The short rate for either part of it is greater than the fraction of the total rate. The risk exists and the protection is given from day to day.

III. *Repairs. Surety Company Bond Premiums, etc.* — These ought in fairness to be apportioned over the period during which they benefit the tenant. If this cannot be done with reasonable certainty, they must lie where they fall, like dividends. But such a result is unfair. The writer has known of a case where a surety company premium for taking out the bond of the trustee was greater than the subsequent annual payments to the company, and the excess greater than the first six months' income. It was wiser to pay this out of income at once than to pay for a bill for instructions, but a fair-minded trustee who had power to decide the question would have charged something to capital, or deferred charging it for a while.

Where a tenant pays anything in the nature of a fine for a lease, or where the landlord, as is often the case, abates rent for a period in consideration of repairs, it would seem that fair adjustments should be made, not only between principal and income where capital is involved, but also between periods of income. An abatement of six months' rent in order to get a three years' lease should be apportioned over the three years. An abatement of rent in order to get the tenant to do structural improvements of equal or greater value should be chargeable to capital.

## GENERAL CONCLUSIONS.

Fortunately, the question of apportionment can be, and often is, disposed of by the construction of the instrument under which it arises. This is sometimes due to accident, and sometimes to the skill of the conveyancer.

The accidents happen when, generally at the end of litigation, it is established that a testator who made a specific bequest or devise of a wasting investment intended that the person entitled to the income at a particular time should have what was then received, whatever its nature. Such cases are simply questions of intention.

There are also cases where the draughtsman has decided beforehand, and laid down a rule of apportionment to be followed in administering the particular fund.<sup>1</sup>

Good draughtsmen now draw their trust instruments to give to the trustee the power to apportion as between life tenant and remainder-man, and it could at least do no harm to extend these clauses so as to cover also apportionment of income. It would seem that these powers are powers of appointment, and should be sustained as such. Still it is likely that some one will want to try the issue whether they do not make the trustee a referee or judge, and whether, in such case, they are so drawn as successfully to avoid the cases which decide that an agreement or direction to arbitrate is void.

Whether or no the will or instrument leaves the discretion to the trustee, it is submitted that the courts ought to do so so far as is practical. The question is one of fact. It is a question of how a prudent man would regard the matter. Investments are as various as can well be in these active days, and their variety results in many odd points and peculiarities of income and outgo. Those which are not peculiar are not the only safe ones for trustees. And once the question of safety is settled, the trustee of to-day ought to have a reasonably free hand. He is already allowed to apportion coupons in his discretion.<sup>2</sup> And this practice ought to apply to the whole general subject. Enough has been said to show that the refinements of the question present many and strange pitfalls for the unwary. Those refinements ought to be tempered with common

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<sup>1</sup> *Hemenway v. Hemenway*, 171 Mass. 42.

<sup>2</sup> *New England Trust Co. v. Eaton*, *supra*.

sense. The adjustments suggested ought to be made, or at least considered, when they are important. But a good trustee is not necessarily either a skilled professional accountant or a trust lawyer, and the writer has no intention to assert that he should be. The object of this article is to show that the question of apportionment is one upon which a trustee ought to be alert. It should never escape his mind, and he should use common sense about it.

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BOSTON, MASS.

## CONCERNING THE ALASKAN BOUNDARY.

**T**HE geographical limits of the dominions of the Emperor of all the Russias on the continent of America, ceded by him to the United States according to the terms of the treaty of March 30, 1867, were set forth in that convention in the following words:

“The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain of February 28 = 16, 1825, and described in articles III. and IV. of said convention, in the following terms: —

“III. ‘Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in a parallel of 54 degrees 40 minutes north latitude, and between 131st and 133d degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel as far as the point of the continent where it strikes the 56th degree of north latitude; from this last mentioned point, the line of demarcation shall follow the summit of the mountains parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation, as far as the frozen ocean.’

“IV. With reference to the line of demarcation laid down in the preceding article, it is understood — First — That the island called Prince of Wales Island shall belong wholly to Russia (now, by this cession to the United States).

“Second — That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention,) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom.”<sup>1</sup>

According to the terms of the convention recently negotiated by Mr. Hay and Sir Michael Herbert, and ratified by the Senate,

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<sup>1</sup> *Treaties and Conventions Concluded between the United States and other Powers*, p. 939. Washington: 1889.



February 11, 1903, a tribunal consisting of six impartial jurors, three appointed by the President, and three appointed by the King, shall endeavor to determine the Alaskan boundary and shall consider in making its decision the articles quoted above from the Russian-American treaty, and particularly articles III., IV. and V. of the earlier treaty of 1825.<sup>1</sup> With reference to these articles it is provided that the tribunal shall answer and decide the following questions:

- "1. What is intended as the point of commencement of the line?
- "2. What channel is the Portland Channel?
- "3. What course should the line take from the point of commencement to the entrance to Portland Channel?
- "4. To what point on the fifty-sixth parallel is the line to be drawn from the head of the Portland Channel, and what course should it follow between these points?
- "5. In extending the line of demarcation northward from said Point on the parallel of the 56th degree of north latitude, following the crest of the mountains situated parallel to the coast until its intersection with the 141st degree of longitude west from Greenwich, subject to the condition that if such line should anywhere exceed the distance of ten marine leagues from

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<sup>1</sup> "III. A partir du Point le plus méridional de l'île dite *Prince of Wales*, lequel Point se trouve sous la parallèle du 54me degré 40 minutes de latitude Nord, et entre le 131me et le 133me degré de longitude Ouest (Méridien de Greenwich), la dite ligne remontera au Nord le long de la passe dite *Portland Channel*, jusqu'au Point de la terre ferme où elle atteint le 56me degré de latitude Nord: de ce dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la Côte, jusqu'au point d'intersection du 141me degré de longitude Ouest (même Méridien); et finalement du dit point d'intersection, la même ligne méridienne du 141me degré formera, dans son prolongement jusqu'à la mer Glaciale, la limite entre les Possessions Russes et Britanniques sur le Continent de l'Amérique Nord-Ouest.

IV. Il est entendu, par rapport à la ligne de démarcation déterminée dans l'Article précédent:

- 1°. Que l'île dite *Prince of Wales* appartiendra toute entière à La Russie:
- 2°. Que partout où la crête des montagnes qui s'étendent dans une direction parallèle à la Côte depuis le 56me degré de latitude Nord au point d'intersection du 141me degré de longitude Ouest, se trouveroit à la distance de plus de dix lieues marines de l'Océan, la limite entre les Possessions Britanniques et la lisière de Côte mentionnée ci-dessus comme devant appartenir à la Russie, sera formée par une ligne parallèle aux sinuosités de la Côte, et qui ne pourra jamais en être éloignée que de dix lieues marines.

V. Il est convenu en outre, que nul Établissement ne sera formé par l'une des deux Parties dans les limites que les deux Articles précédens assignent aux Possessions de l'Autre. En conséquence, les Sujets Britanniques ne formeront aucun Établissement soit sur la côte, soit sur la lisière de terre ferme comprise dans les limites des Possessions Russes, telles qu'elles sont désignées dans les deux Articles précédens; et, de même, nul Établissement ne sera formé par des Sujets Russes au delà des dites limites.

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the ocean, then the boundary between the British and the Russian territory should be formed by a line parallel to the sinuosities of the coast and distant therefrom not more than ten marine leagues, was it the intention of said convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe or strip of coast on the mainland, not exceeding ten marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the ocean, and extending from the said point on the 56th degree of latitude North, to a point where such line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich?

“6. If the foregoing question should be answered in the negative, and in the event of the summit of such mountains proving to be in places more than ten marine leagues from the coast, should the width of the *lisière*, which was to belong to Russia be measured (1) from the mainland coast to the ocean, strictly so-called, along a line perpendicular thereto; or (2) was it the intention and meaning of the said convention, that where the mainland coast is indented by deep inlets, forming part of the territorial waters of Russia, the width of the *lisière* was to be measured (a) from the line of the general direction of the mainland coast, or (b) from the line separating the waters of the ocean from the territorial waters of Russia, or (c) from the heads of the aforesaid inlets?

“7. What, if any, are the mountains referred to as situated parallel to the coast, which mountains, when within ten marine leagues from the coast, are declared to form the eastern boundary?”

The purpose of this paper is solely to consider the problem indicated in the fifth question, concerning the intention of the convention of 1825 with reference to the boundary from the point on the 56th degree of north latitude to the intersection of the 141st degree west longitude, the nature of the line between these points, and the method of its demarcation. It is, therefore, necessary to examine with care the several negotiations preliminary to the Anglo-American treaty in the light of the published correspondence relating thereto.<sup>1</sup>

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<sup>1</sup> A lucid and authoritative article concerning this correspondence, by Hon. John W. Foster, Ex-Secretary of State, appeared in *National Geographic Magazine*, Vol. X. p. 425. See also paper by Thomas Hodgins on *The Canada-Alaska Boundary Dispute*, *The Contemporary Review*, August, 1902, p. 190; *The Alaskan Boundary*, by Professor J. B. Moore, *North American Review*, Vol. 169, p. 501; *The Alaskan Boundary*, by Horace Townsend, *Fortnightly Review*, Vol. 72, p. 490; *The Alaskan Boundary Dispute*, by Professor Chas. N. Gregory, No. 315, *Law Magazine and Review*, February, 1900; unsigned leading article, No. 392, *Edinburgh Review*, April, 1900, p. 279; *Statement of Facts regarding the Alaska Boundary Question*, compiled for the Government of British Columbia by Alexander Begg, Victoria, B. C., 1902; *The Alaska Frontier*, by Thomas W. Balch, Philadelphia, 1903.

In order to do this intelligently, it is well to note the contour of the northwest coast of America between Mount St. Elias at the north and Dixon Entrance at the south, as shown on the accompanying map. It will be observed that the coast between these points is indented irregularly by long arms of the sea, continuous in width, of great depth, and forming a connecting line of straits between the mainland and the large islands which breast the ocean. These fiords taken with the peninsulas and islands which separate them from the sea constitute a well-defined parallelogram, cutting into the northwest coast.

It is well known that the negotiations leading up to the treaty of 1825 grew out of the desire on the part of Great Britain to secure the renunciation by the Emperor of Russia of the pretensions made by him in his Ukase of 1821, by the terms of which that monarch claimed exclusive right of jurisdiction for a distance of one hundred Italian miles over the ocean from 45° 50' north latitude on the Asiatic coast to the northward, and southeasterly on the northwest coast of America to 51° north latitude. This decree prohibited foreign vessels from approaching Russian territory within these limits, while the pursuit of all commerce was exclusively granted to Russian subjects. It was also desired by Great Britain to fix the limits between the English and Russian possessions on the northwest coast of America; but the determination of the boundary was a matter of secondary importance to the British Foreign Office.<sup>1</sup>

The negotiations were carried on at St. Petersburg by Count Nesselrode and M. Poletica in behalf of Russia, and by Sir Charles Bagot, the British Ambassador, under the instructions of Mr. George Canning, the Secretary of State for Foreign Affairs. These instructions were prepared under the guidance of Mr.

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 446. Mr. George Canning said, in writing to Mr. Stratford Canning: "The whole negotiation grows out of the Ukase of 1821. So entirely and absolutely true is this proposition that the settlement of the limits of the respective possessions of Great Britain and Russia on the northwest coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw, with less appearance of concession, the offensive pretensions of that Edict.

"It is comparatively indifferent to us whether we hasten or postpone all question respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it."

Pelly, Chairman of the Hudson's Bay Company, who had informed the Secretary that the most southern establishment of Russia on the northwest coast of America was on a small island, in latitude 57°, that there was no Russian settlement on the mainland, nor any commerce to the eastward of the coast. Mr. Pelly suggested, therefore, "either the channel between the islands and the mainland, as the most desirable line of demarcation to the eastward, which being agreed to, the line to the southward might be drawn so as to comprehend Sitka and all the Russian settlements upon the islands."<sup>1</sup> Sir Charles Bagot was given greater freedom, however, and was informed that, "if necessary, the line must be drawn on the mainland to the northernmost post of the North-West Company from east to west till it strikes the coast, and thence may descend to whatever latitude may be necessary for taking in the island on which Sitka stands."<sup>2</sup> Mr. Canning was doubtful how far to the eastward the claims of Russia might be extended on the mainland, from whatever point might be agreed upon as the southern limit of her possessions. Therefore his advice on this point to his Ambassador is significant:

"It is absolutely essential, therefore, to guard against any unfounded pretension or any vague expectation of Russia to the eastward, and for this purpose it is necessary that whatever degree of latitude be assumed, a definite degree of longitude should be also assigned as a limit between the territorial rights of the two Powers. . . . It would, however, in that case, be expedient to assign with respect to the mainland south of that point, a limit, say of 50 or 100 miles from the coast, beyond which the Russian posts should not be extended to the eastward. We must not on any account admit the Russian territory to extend at any point to the Rocky Mountains."<sup>3</sup>

With such instructions Sir Charles Bagot made a definite proposition for the demarcation of the boundary line. He proposed that it be drawn through Chatham Straits to the head of Lynn Canal, thence northwest to the 140th degree of longitude<sup>4</sup> (line A, Map). A written *contre-projet* was offered in behalf of Russia. In this document Russia claimed the territory as far south as the 55th degree, supporting this contention by the limits assigned to Russian possessions by the Charter granted by the Emperor Paul to the Russian-American Company in 1799. In view of the fact that the 55th degree of north latitude cut through Prince of Wales

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 417.

<sup>2</sup> Ibid. 419.

<sup>3</sup> Ibid. 419-420.

<sup>4</sup> Ibid. 424.

Island the proposition was made that this island be wholly within Russian territory. The Russian plenipotentiaries expressed the wish to have the line pass up Portland Channel to the mountains which bordered on the coast, thence along the mountains parallel to the sinuosities of the coast as far as the 139th degree west longitude. The following reason was assigned for such a line:

“Le motif principal qui force la Russie à insister sur la souveraineté de la lisière indiquée plus haut sur la terre ferme depuis le Portland Canal jusqu'au point d'intersection du 60 avec le 139 longitude, c'est que, privée de ce territoire, la Compagnie Russe-Américaine n'auroit aucun moyen de soutenir les Établissements qui seroient dès lors sans point d'appui, et qui ne pourroient avoir aucune solidité.”<sup>1</sup>

In return Russia offered to give to British subjects free navigation of all the rivers “qui aboutissent à l'Océan dans cette même lisière.” The opening of the Russian Port of New Archangel to British subjects was made a further inducement for the acceptance of this proposition.

It is clear that the sense of a need of a continuous strip of Russian mainland from Portland Channel to the intersection of the 139th degree of west longitude caused the Russian plenipotentiaries to refuse the British proposition.

The Russian *contre-projet* was unacceptable to Sir Charles Bagot. He stated that a line drawn according to the Russian plan would deprive Great Britain of the sovereignty of all the inlets and small bays between latitudes 56° and 54° 45' the greater portion of which were in direct communication with the establishments of the Hudson's Bay Company, and of peculiar importance to its commerce. He further contended that the Russian-American Company did not possess a single establishment on the mainland between the parallels of latitude mentioned.<sup>2</sup>

Thereupon Sir Charles Bagot made a second offer. He proposed to draw the line between Admiralty Island to the north and Duke of York and Prince of Wales islands to the south directly to the mainland, “coupled with the concession,” as he writes, “of a line of coast extending 10 marine leagues into the interior of the continent”<sup>3</sup> (see line B, Map).

His proposal to Russia was expressed in the following language:

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 427.

<sup>2</sup> Ibid. 427-428.

<sup>3</sup> Ibid. 424.

“ La Grande-Bretagne proposeroit de prendre pour ligne de démarcation entre des territoires des deux Puissances une ligne tracée de l’ouest vers l’est, par le milieu du canal qui sépare les Îles du Prince de Galles et du Duc d’York de toutes les îles situées au nord des dites îles jusqu’à ce qu’elle touche la terre ferme. De là se prolongeant dans la même direction sur la terre ferme jusqu’à un point distant de la côte de 10 lieues marines, la ligne remonteroit de ce point vers le nord et le nord-ouest, parallèlement aux sinuosités de la côte, et toujours à la distance de 10 lieues marines du rivage, jusqu’à 140 degré de longitude (de Greenwich) dont elle suivroit alors du prolongement jusqu’à la Mer Polaire.”<sup>1</sup>

Reference to the map indicates that this second British offer placed the southern boundary of Russia on the continent at a point lower than the 57th degree of north latitude. Sir Charles Bagot’s comment on the scope of his proposal is significant:

“ La Ligne . . . assureroit à la Russie non seulement une lisière sur le continent, vis-à-vis de . . . l’Établissement le plus méridional qu’elle possède sur les îles, mais qui lui assureroit aussi la possession de toutes les îles et les eaux qui l’avoisinent, ou qui se trouvent placées entre cet Établissement et la terre ferme, la possession enfin de tout ce qui pourroit devenir, par la suite, de quelque utilité, ou pour la solidité ou pour sa prospérité.”<sup>2</sup>

It is apparent that it was the intention of the British ambassador that, if the Russian frontier could be limited on the south by the line suggested by himself, the channels and straits to the north should remain under exclusive Russian control, as well as the strip of mainland which they bounded; that Russian sovereignty over such waters, whether outside straits or fiords penetrating far inland, should include at every point an adjacent strip of the coast; that north of the line agreed upon there should be an unbroken belt of water and mainland. The Russian plenipotentiaries objected to this second proposal on the ground that without a strip of land along the edge of the continent starting from Portland Channel, the Russian establishments on the neighboring islands would be without a base of support, and at the mercy of foreign settlements which might be made on the mainland.<sup>3</sup>

<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 428.

<sup>2</sup> Ibid. 429.

<sup>3</sup> Ibid. 429. “ D’autre part, les Plenipotentiaires de Russie ont l’honneur de lui observer itérativement, que sans une lisière sur la côte du continent à partir du Portland Channel, les Établissements Russes des îles du voisinage n’auroient aucun point d’appui; qu’ils seroient à la merci de ceux que des étrangers formeroient sur la terre ferme, et que tout arrangement semblable, loin d’être fondé sur le principe des conventions mutuelles, ne présenteroit que des dangers à l’une des Parties et des avantages exclusifs à l’autre.”



In his reply Sir Charles Bagot stated that discovery and occupation of islands should not give Russia rights on the mainland south of her actual establishments on the coast; that there were no Russian settlements on the mainland south of the 60th degree of north latitude; that the Hudson's Bay Company was established on the mainland north of the 55th degree north latitude and near the coast; that Great Britain could not renounce the sovereignty of the coast south of  $56^{\circ} 30'$  without sacrificing the interests of that corporation; that it was of great importance to his government to retain control over both banks of Portland Channel inasmuch as it was the outlet of a river dividing the territory occupied by the British Company. He thereupon made a third proposal as to the line of demarcation, suggesting that it be drawn from the southernmost extremity of Prince of Wales Island, through the middle of the Duke of Clarence Sound, as far as the middle of the channel separating Prince of Wales and Duke of York islands from those situated to the north, thence eastward in the middle of that channel to the mainland and thence to be prolonged according to his second proposal<sup>1</sup> (see line C, Map).

This proposal also was unsatisfactory to Russia, for the reason, it was contended, that Prince of Wales Island would be valueless without the support of a portion of the mainland coast situated opposite, and that deprived of such a base the Russian settlements established on that island would be flanked by English settlements on the opposite mainland and wholly at their mercy. The Russian plenipotentiaries further called attention to recent maps showing no English establishments on the northwest coast of America south of  $54^{\circ} 40'$ .<sup>2</sup> Thereupon Sir Charles Bagot broke off negotiations.

Shortly thereafter Mr. Canning wrote to Count Lieven, the Russian Ambassador at London, informing him that Sir Charles Bagot's discretion would be enlarged so as to enable him to admit

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 429. This line was intended to run north of the small island known as Zarembo Island, rather than between it and Etolin Island, which was formerly known as Duke of York Island. According to Vancouver's map, which was the map used by the negotiators of the treaty of 1825, the words "Duke of York's Island" is attached to the territory comprising both Zarembo and Etolin islands, but which according to the map constitute a single island. Probably it was not known to the explorer that a channel separates what appeared to him to be a single piece of land. The natural channel between Prince of Wales Island, and the islands to the north, passes to the north of Zarembo Island.

<sup>2</sup> Ibid. 430.

with certain qualifications the last proposals of the Russian government.<sup>1</sup>

Accordingly, the British Ambassador was given new instructions and furnished with a draft of a treaty. With reference to the easterly boundary Sir Charles Bagot was warned that it would be dangerous to determine the line merely by means of the mountain range along the coast, in view of the fact that mountains were often incorrectly laid down in the maps, and that therefore there should be some other security taken to prevent the line being carried too far inland. To provide for this difficulty, Mr. Canning suggested that the line "should in no case be carried further to the east than a specified number of leagues from the sea."<sup>2</sup> Article III. of his draft provided that the line "shall not, in any case, extend more than marine leagues in breadth from the sea towards the interior at whatever distance the aforesaid mountains may be."<sup>3</sup> The general line of demarcation provided by Mr. Canning conformed to the Russian requirements. It included within Russian territory the Prince of Wales Island, and from the southern extremity thereof, the line was drawn through Portland Channel as far as the coast of the continent at the 56th degree of north latitude, thence along the coast in a direction parallel to its windings and at or within the seaward base of the mountains as far as 139th degree west longitude. Sir Charles Bagot was, however, given discretion to substitute the summit of the mountains for the "seaward base" with the proviso that "the stipulation as to the extreme distance from the coast to which the *lisière* is in any case to run, be adopted, and provided a stipulation be added that no forts shall be established or fortifications erected by either party on the summit or in the passes of the mountains."<sup>4</sup>

Mr. Canning was extremely desirous of securing for British subjects the permanent right to navigate and trade along the line of coast and islands to be assigned to Russia, as well as the right of navigation and commerce to and from rivers passing through the interior of the continent and crossing the *lisière* in their course to the sea.

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 432. "The qualifications will consist chiefly in a more definite description of the limit to which the strip of land required by Russia on the continent is to be restricted; in the selection of a somewhat more western degree of longitude as the boundary to the northward of Mount Elias; in precise and positive stipulations for the free use of all rivers which may be found to empty themselves into the sea within the Russian frontier, and of all seas, straits, and waters which the limits assigned to Russia may comprehend."

<sup>2</sup> Ibid. 433.

<sup>3</sup> Ibid. 435.

<sup>4</sup> Ibid. 437.

The full and permanent opening of the port of New Archangel to British commerce was also desired. Finally, he wished to obtain reciprocally for the vessels of both nations, for a period of years (twenty, if possible), the right of navigation and trade on "the other parts of the northwest coast of America, and of the islands adjacent thereto." He therefore inserted in his draft of a treaty articles to secure this end.<sup>1</sup>

These propositions also were unsatisfactory to Russia. Her plenipotentiaries were unwilling to open the port of New Archangel to British commerce *forever*. They were quite unwilling to grant to British subjects *forever* the privilege of navigating and trading along the coast of the *lisière* between Portland Channel and the 60th degree north latitude.

In this connection they expressed a willingness to grant to British subjects such a liberty for ten years, and they were ready to grant a permanent right of ingress and egress into and from such rivers as emptied into the Pacific Ocean from the northwest coast within the *lisière*. They stated, however, that under no circumstances could they be induced "to grant to any power the privilege to navigate and trade in perpetuity with any country the full sovereignty of which was to belong to Russia; that such perpetual concession was repugnant to all national feeling, and was inconsistent with the very idea of sovereignty."<sup>2</sup> Finally, they objected to the reciprocal liberty of the subjects of each power to visit the other portions of the northwest coast for a term of years.

Again negotiations were broken off by Sir Charles Bagot. It is to be noted that the points of disagreement at this time related wholly to the use of waters and rights of navigation to be enjoyed by British subjects. The fact that throughout the discussion no

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 435. "That British subjects shall forever freely navigate and trade along the said line of coast, and along the neighboring islands.

"That the navigation and commerce of those rivers of the continent which cross this line of coast shall be open to British subjects as well to those inhabiting or visiting the interior of this continent as to those coming from the Pacific Ocean who shall touch at these latitudes.

"With regard to the other parts of the northwest coast of America, and of the islands adjacent thereto, belonging to either of the two High Contracting Parties, it is agreed that, for the space of      years from the      April, 1824, their respective vessels, and those of their subjects, shall reciprocally enjoy the liberty of visiting without hindrance the gulfs, havens, and creeks of the said coast, in places not already occupied, for the purpose of fishery and of commerce with the natives of the country."

<sup>2</sup> Ibid. 439, 440, 441.

distinction was made between the rights of British subjects to navigate the outer straits and channels and the inner bays and fiords, is very significant. If it had been the intention on the part of negotiators that the eastern line of the frontier between Portland Channel and the 140th degree of west longitude should cut across deep channels, the inference is reasonable that the right of British subjects to navigate such waters would have been discussed; and in any event the effort would have been made by the British plenipotentiary to secure express stipulations protecting the rights of his fellow subjects in the inner waters, although Russia might be unwilling to permit the free navigation of the outer straits and bays belonging to herself. It seems clear that it did not occur to Sir Charles Bagot or Mr. Canning on the one part, nor to the Russian plenipotentiaries on the other, that any of the waters or arms of the sea indenting the mainland coast between Portland Channel and the 140th degree of west longitude, should not be under exclusive Russian sovereignty.<sup>1</sup> For that reason no effort was made to distinguish between the inner and outer portions of deep bays and channels. This conclusion is fortified by the fact that Russia did acknowledge the right of British subjects to navigate rivers traversing British territory and crossing the *lisière* on their way to the sea. No waters other than rivers were had in contemplation between the termini mentioned which were to be other than Russian.

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<sup>1</sup> It is true that prior to the beginning of negotiations with Sir Charles Bagot, Count Nesselrode in addressing the Russian ambassador at London spoke generously of the treatment to be accorded British settlements in Alaska. The following sentence, however, does not indicate that he was prepared to recognize British control over waters of the sea penetrating the mainland north of the southern frontier to be established: "Si l'on invoque le principe des convenances mutuelles, la Russie laisse au développement progressif des Établissements Anglois, une vaste étendue de côte et de territoire; elle leur assure de libres débouchés; elle pourvoit aux intérêts de leur commerce, et pour compenser tant d'offres dictées par le plus sincère esprit de conciliation, elle se réserve uniquement un point d'appui, sans lequel il lui seroit impossible de garder une moitié de ses domaines." *Fur Seal Arbitration Papers*, 1893, Vol. IV. p. 401. Nor do the words of the Russian plenipotentiaries expressed after their refusal of Sir Charles Bagot's second proposal during the first of the series of negotiations, suggest necessarily that the waters referred to were other than rivers, or that to Great Britain, in the final division of territory, should be assigned ports on the sea. "Les Plénipotentiaires de Sa Majesté Impériale, prévoyant même le cas où, sur la lisière de la côte qui appartiendrait à la Russie, il se trouveroit des fleuves au moyen desquels les Établissements Anglois pourroient communiquer avec l'Océan, se sont empressés d'offrir, par une stipulation éventuelle, la libre navigation de ces fleuves." *Ibid.* 429.

Again negotiations were resumed. Mr. S. Canning (subsequently Sir Stratford Canning) succeeded Sir Charles Bagot as the British plenipotentiary. He was reminded that the settlement of the boundary was of less consequence to his government than the renunciation by Russia of the claims set forth in the Ukase of 1821. He was informed that Great Britain was content to accept the period of ten years for the limit of the reciprocal liberty of access and commerce within the Russian and British possessions according to the terms of Article iv. of the treaty between the United States and Russia of 1824. Nor was objection made to the restrictions which Russia insisted upon with regard to the port of New Archangel. Finally, Mr. Canning said:

"It remains only, in recapitulation, to remind you of the origin and principles of this whole negotiation.

"It is *not*, on our part, essentially a negotiation about limits. It is a demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent; but a demand qualified and mitigated in its manner, in order that its justice may be acknowledged and satisfied without soreness or humiliation on the part of Russia.

"We negotiate about territory to cover the remonstrance upon principle."<sup>1</sup>

The result was the treaty finally negotiated in 1825.<sup>2</sup>

Articles III. and IV. incorporated in the Russian-American treaty of 1867 have already been set forth. Article V. of the treaty of 1825 contained the following: —

"It is, moreover, agreed that no establishment shall be formed by either of the two parties within the limits which the two preceding articles assign to the possession of the other. Consequently British subjects shall not form any establishment either upon the coast or upon the mainland strip comprised within the limits of the Russian possessions as they are designated in the two preceding articles, and likewise, no establishment shall be formed by the Russian subjects beyond the said limits."<sup>3</sup>

From the examination of the entire series of negotiations between Russia and England leading up to the treaty of 1825, certain inferences as to the intention of the negotiators seem clear. In the first negotiations Sir Charles Bagot's chief object was to keep the southern boundary of the Russian possessions as far north as pos-

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 448.

<sup>2</sup> Line D on the map indicates the boundary line drawn according to the American interpretation of the Anglo-Russian treaty of 1825.

<sup>3</sup> Translation, XII. Brit. and For. St. P. 40.

sible. The three lines on the accompanying map indicate how he was gradually forced to retreat from the head of Lynn Canal to the southernmost point of Prince of Wales Island. In his several propositions he indicated a willingness to run the boundary into the interior of the mainland. From the language used by him, as well as by the Russian plenipotentiaries, it was assumed that the British frontier north of any line to be agreed upon would not touch the coast or the waters indenting it. Nor is there any indication that Sir Charles Bagot intended that the strip of *lisière* should be any narrower or different from the strip which he suggested in his second proposal in the first of the series of negotiations. In none of the discussions between himself and the Russians did he suggest that Great Britain should retain sovereignty over a single point on the coast of the southern boundary of the Russian frontier. His appreciation of the fact that Russia would exercise its sovereign rights on the mainland over an unbroken territory caused him to make strenuous efforts to keep the Russian boundary as far north as possible.

It has been already noted that the second series of negotiations related chiefly to the rights of British subjects in the waters adjacent to the *lisière*. Again attention is called to the fact that the British plenipotentiary as well as Count Nesselrode and M. Poletica made no distinction between the claims of Great Britain respecting the right to navigate the waters, other than rivers, penetrating the coast. The implication is reasonable that the representatives of both countries believed that all such waters should belong exclusively to the power having sovereignty over the coast. The vigorous attempt on the part of England to secure the right of access to the channels and other waters along the coast *forever*, and the final agreement on her part to accept the privilege of navigation in such waters for the limited space of ten years, without making any attempt to reserve for her subjects the right to navigate the straits or bays adjacent to which she might retain sovereignty over the mainland coast, emphasizes strongly the fact that it did not occur to her representatives that England was to have dominion over any point on the mainland coast touching an arm of the sea.

Nothing appears in the last of the series of negotiations to indicate a different intention on the part of the British negotiators with reference either to the width of the *lisière* or the status of the waters penetrating it. The purpose of Great Britain candidly expressed above by Mr. George Canning in his final instructions to



Mr. Stratford Canning needs no comment. Great Britain was unsuccessful in her attempt to check the pretensions of Russian sovereignty north of  $54^{\circ} 40'$ . She expected to yield the mainland coast north of the most southerly point agreed upon; and she did so. She sought the right of access and navigation over the vast extent of inland waters separating the outer islands from the mainland coast along the *lisière*; and she failed. And yet withal she was willing to agree to the terms of the treaty of 1825 in order to secure a revocation of the Ukase of 1821. Whether or not the treaty actually concluded was an acknowledgment of the existing sovereignty of Russia over the territory assigned to her, is an immaterial question. From the British point of view there was good consideration for the sacrifice of rights in the withdrawal of the pretensions made by the Emperor in 1821.

British writers have laid much stress on the words used by the Russian plenipotentiaries to describe the *lisière*. Attention has been called to the expressions used by Count Nesselrode in describing the strip of coast: "*étroite lisière sur la côte*," "*une simple lisière du continent*," "*un médiocre espace de terre ferme*."<sup>1</sup> The expression "*point d'appui*" was more than once used to signify the desired strip of continent opposite Prince of Wales Island. It has been contended that such terms are not properly descriptive of a belt of mainland surrounding all arms of the sea along an extended coast line. It is argued that the words employed by Count Nesselrode preclude the intention imputed to him by the American government. In reply, it is suggested that inferences as to the intentions of the Russian plenipotentiary cannot fairly be drawn from isolated phrases culled from the published correspondence. It is further submitted that the expressions attributed to Count Nesselrode were not inappropriate to describe an unbroken coast line. In view of the enormous extent of British Columbia to the north and west of the boundary, a narrow strip of land only ten marine leagues in width might be appropriately termed "*une simple lisière du continent*," "*un médiocre espace de terre ferme*;" nor was the expression "*point d'appui*" inapt to denote the strip of land necessary to protect Prince of Wales Island from the encroachments of British traders.

It has been stoutly maintained that whatever may have been

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<sup>1</sup> Fur Seal Arbitration Papers, 1893, Vol. IV. p. 399. Thomas Hodgins in The Contemporary Review, August, 1902, p. 191.

the claims of Russia in the preliminary negotiations, the language of the treaty of 1825 respecting the line between the Portland Channel and the 141st degree of west longitude conclusively indicates the soundness of the British contention that the *lisière* should be measured according to the general direction of the coast and without regard to the sinuosities of the same. Attention is called to the text:

"That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection to the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia, as above mentioned, (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."<sup>1</sup>

It has been argued that the word "ocean" (*l'océan*) indicating the distance of the line from the mountains in contrast to the word "sea" (*mer*) employed in the earlier drafts of the treaty is strong proof of the British contention<sup>2</sup> that "the line of demarcation of the Russian strip of coast was to be ten marine leagues from the ocean coast, and not from the upper shores of inlets, bays, or other arms of the sea."<sup>3</sup> It is significant that the word "ocean" was used in the treaty merely to indicate the distance of the mountains from the water, and that wherever the mountains were beyond a specified distance from the "ocean," the width of the frontier should be measured not from the "ocean," but from the coast (*côte*); the word "ocean" was employed simply with reference to the location of the mountains.

But it is submitted that the word "ocean" was not employed by the negotiators of the treaty of 1825 in a technical sense, to indicate the unenclosed waters of the sea or high seas excluding

<sup>1</sup> XII. Brit. and For. St. P. 40.

<sup>2</sup> Leading article *Edinburgh Review*, No. 392, April, 1900, p. 279 (p. 295): "However relevant the word 'ocean' might be to those parts of bays which from their breadth and conformation are common international waters, it cannot with any accuracy be applied to inlets which by international law and common consent are parts of the territory of the country owning the shores thereat; and consequently the line, whether marked by mountains or by a survey line, should be drawn without reference to such inlets."

<sup>3</sup> Thomas Hodgins, *Contemporary Review*, August, 1902, p. 193.

in its signification ports, harbors, channels, and straits denoted by the term "sea." If their intention had been to use the word in a restricted sense, the line of mountains referred to might have been those which rise from the several islands adjacent to the coast, and the method of locating the mountains would have rendered meaningless the method used to locate the frontier line at points where the mountains might be beyond the specified distance from the water, unless the word "coast" (*côte*) employed in the treaty signified the ocean coast of the outer islands. Measurement of the line by such a method would place the frontier between the islands and the mainland, which was clearly not the intention of Great Britain or Russia in 1825. Examination of the correspondence above negatives conclusively any inferences of such intention.<sup>1</sup>

It is urged by Great Britain that even though it be admitted that the boundary line be drawn in general along the mainland, the mountains referred to in the treaty as constituting the frontier are the low ranges within three to five miles of the coast; that the limit of the *lisière* should, in general, follow the crest of these mountains bringing the line close to the sea, and crossing low-lying valleys and arms of the sea or bays by means of a course measured from crest to crest; and that there should be no need of a continuous range or chain of mountains to justify such a course. Lack of space prevents detailed discussion in this paper of the reasons why it is unreasonable to assume that the plenipotentiaries intended these mountains to form the line of demarcation in such a way.<sup>2</sup>

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<sup>1</sup> A significant admission on the part of a British writer is expressed in the Edinburgh Review for April, 1900, at p. 300: "On the letter of the treaty the British side has, we think, a decided advantage, prejudiced to some extent by extravagant claims put forward by over-zealous British Columbians, — such for instance, as that the coast refers to the outer shore of the islands, which would not allow the Americans any foothold on the continent at all, though the whole dispute is about a strip of coast on the mainland as distinct from the islands. Scarcely less tenable is the theory that Portland Channel of the treaty does not mean Portland Channel, but Clarence Strait, an entirely different body of water which Sir C. Bagot endeavored to get as the boundary and failed."

<sup>2</sup> On this point the language of Hon. John W. Foster, in National Geog. Mag., November, 1899, p. 436, is of interest: "This language of the treaty presupposes that there existed a defined mountain chain, to repeat its terms, 'situated parallel to the coast,' or 'which extends in a direction parallel to the coast;' but the surveys of the region made since the territory of Alaska was ceded to the United States have established the fact that there is no such defined chain or watershed within 10 marine leagues of the sinuosities of the coast except at two points, namely, White and Chilkoot passes; hence the United States claims that the boundary of the strip is placed

The principal objection to such a claim is the fact, as shown by the correspondence above examined, that it was not the plan of Russia to allow Great Britain to enjoy permanent rights in the waters penetrating the *lisière* (other than rivers), and that it did not occur to any of the plenipotentiaries that Great Britain should have the right of access to or navigation in those waters without the consent of Russia. A boundary line cutting across the arms of the sea at several points would have afforded Great Britain several deep sea ports, and, as has already been shown, would have rendered it a necessary precaution that her rights in the same should be safeguarded by express declarations in the treaty. This same reasoning would prevent the measurement of the width of the *lisière* from the line of the general direction of the mainland coast, inasmuch as a strip of mainland though ten marine leagues in width, if measured in this way, regardless of the windings and deep inlets of the coast, would nevertheless cut across arms of the sea.

It has been frequently argued by British writers that the territorial waters of Russia on the outer coast of the islands adjacent to the sea as well as those lapping the mainland coast should be taken into consideration in measuring the width of the *lisière*. The rights of a state over waters adjacent to its ocean shore as well as over the bays and arms of the sea indenting its coast line are necessarily based on the law of nations, and owe their existence to the consent of civilized maritime states. That consent manifested in different ways gives to the individual state limited rights varying according to the geographical location of the waters in question. Although writers of repute and learned tribunals have failed to indicate with precision the rights of a state over its so-called territorial waters, all have agreed that the control which a nation may properly exercise over the waters adjacent to its ocean coast, even though within a limited distance, are much narrower than that which it may exercise over bays and channels within its limits.<sup>1</sup>

Waters of either class are different from land in legal contemplation in the sense that they are not within the absolute control

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10 marine leagues from the coast at all points except at White and Chilkoot passes, and that the strip is an unbroken belt of territory on the mainland, following the sinuosities of the coast around the inlets of the sea."

<sup>1</sup> Reg. v. Keyn, 2 Ex. D. 63; The Schooner Washington, Report of the Commission of Claims, 1853, p. 170; The Alleganean, 4 Moore's Internat. Arb. 4333.

of the state exercising sovereignty over the neighboring land. For that reason it would seem inappropriate to permit the territorial waters of Russia to be used in estimating the proper width of the *lisière*. This objection would be the stronger if the attempt were made to measure the strip of Russian territory along the Alaskan coast from the outer edge of the territorial waters adjacent to the coast of the outer islands. But the extent and nature of the territorial waters of Russia are really immaterial in determining the width of the *lisière* or the method of its demarcation, for the reason that the negotiators of the treaty of 1825 attempted to draw a frontier line which should not approach the sea or its inlets at any point between the head of Portland Channel and the 141st degree of west longitude.

To recapitulate: the communications between Russia and Great Britain leading up to the treaty of 1825 justify the conclusion that the line between the head of Portland Channel and the 141st degree of west longitude should follow the sinuosities of the coast, and that Russia was to have exclusive possession of a continuous strip of mainland not exceeding ten marine leagues in width and separating the British territory from the bays and inlets of the sea.

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MUNICIPAL REGULATION OF STREET RAILWAYS. — A city ordinance required existing street railway companies to pave and keep in repair the space between their rails and tracks and one foot beyond on each side. The Court of Errors and Appeals of New Jersey, reversing the Supreme Court, decided that the ordinance could not be supported as an exercise of the police power. *Fielders v. North Jersey St. Ry. Co.*, 53 Atl. Rep. 404. In contrast with this decision stands the late holding of the Supreme Court of Illinois, likewise reversing a lower court, and declaring that an ordinance requiring street railway companies to clean the street between their rails falls reasonably within the police power. *City of Chicago v. Chicago Union Traction Co.*, 65 N. E. Rep. 243. These cases illustrate the difficulty of determining the practical limits of a power which is well defined in theory.

The general principle is clear that municipalities cannot impair their contracts with corporations by imposing new burdens upon them. On the other hand it is equally true that municipalities can always exercise police power over corporations. Indeed, as the Illinois court points out, the city cannot surrender or contract away the governmental power of police control delegated to it by the state. The absence of definite tests as to the limits of this power has, however, brought about results more or less inconsistent. Certain classes of ordinances intended to promote public safety and well-being clearly fall within the police power. Regulations of speed and general management are valid if reasonable. *State, Trenton, etc., Co., Pros. v. Trenton*, 53 N. J. Law 132. So, too, ordinances are upheld which provide that no affirmative injury shall be done, for example, that snow shall



not be plowed from the tracks onto the rest of the street. *Broadway, etc., Ry. Co. v. Mayor*, 49 Hun (N. Y.) 126. Sprinkling the tracks with sand may be forbidden. *State, Consolidated Traction Co., Pros. v. Elizabeth*, 58 N. J. Law 619. Even in the absence of express regulation street railways are bound to lay rails properly and to keep them in repair, and to avoid obstructing or endangering passage. *Rockwell v. Third Ave. Ry. Co.*, 64 Barb. (N. Y.) 438.

The limits of the police power, however, would seem in general to be passed when the ordinances are designed not to protect the public, but to relieve it from such municipal burdens as paving, repairing, and cleaning the streets. Nevertheless, the Illinois decision may, perhaps, meet with approval in sustaining the ordinance requiring the cleaning of the tracks. *Cf. Village of Carthage v. Frederick*, 122 N. Y. 268. The court points out that railways are given exceptional privileges in the use of the streets, and furthermore have themselves caused the special need and difficulty of cleaning between the tracks. In a somewhat similar case an ordinance requiring railway companies to sprinkle their tracks was upheld. *City, etc., Ry. Co. v. Mayor, etc., of Savannah*, 77 Ga. 731. Any further imposition of burdens is difficult to justify. Some courts, it is true, have supported ordinances similar to that condemned in New Jersey, requiring companies to repair between and about the rails. *City of Harrisburg v. Harrisburg P. Ry. Co.*, 1 Pearson (Pa.) 298; see *Memphis, etc., Ry. Co. v. State*, 87 Tenn. 746. A New Jersey *dictum* often quoted to the same effect is expressly repudiated by the principal case. The latter seems clearly right in principle. The ordinances in question are intended to shift public burdens, to compel the companies to do something which otherwise the city would have to do, something which would have to be done though the companies were not in existence. They are not measures for public safety and convenience, but devices for revenue purposes. Moreover, it is hard to distinguish them from regulations requiring paving, and the weight of authority is strongly against ordinances of the latter sort. *Kansas City v. Corrigan, etc., Ry. Co.*, 86 Mo. 67. It is obviously necessary carefully to distinguish cases where provisions as to paving and repairing are contained in the charter.

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**CRIMINAL ATTEMPT.** — An intended crime may fail of accomplishment, (1) because voluntarily abandoned; (2) because the means used are inadequate; (3) because an unforeseen obstacle intervenes; or (4) because the object upon which it is intended to be committed is not present. In the first three cases, since there is no doubt as to the criminal intent, the only point to be considered is whether the act done is of sufficient importance for the law to notice it — whether it is such as to cause alarm to society. In determining this, both the magnitude of the crime intended and the nearness of the act done to the projected result must be taken into account. When courts arrive at different results upon similar states of fact, it is to be attributed, not to a difference as to the law, but rather to a difference in judgment as to the importance of the act done. Compare *People v. Sullivan*, 173 N. Y. 122; *People v. Stites*, 75 Cal. 570; *People v. Youngs*, 122 Mich. 292.

There is greater difficulty, however, where the object against which the crime is directed is not present. It is generally held that there may be an

attempt to commit larceny though there is no property to steal. *Commonwealth v. McDonald*, 5 Cush. (Mass.) 365. On the other hand, text writers seem to agree that if a person shoots at a shadow thinking it to be an enemy, it is not an attempt to murder. See BISHOP, CR. LAW, § 742; WHARTON, CR. LAW, § 186. The reason sometimes given is that the real intent is to shoot at the shadow. As a matter of fact, however, most acts are accompanied by many different intents. The act of shooting involves, among others, intents to aim, to pull the trigger, and to set off the load. In the case just supposed the intent to kill an enemy is no less real than the intent to shoot at the shadow. The person doing the shooting would be very much surprised to be told that he was without the evil intent. See *Rex v. Coe*, 6 C. & P. 403. Further, the larceny cases are very difficult to explain unless the necessary intent is regarded as being present. It is believed that the real test should be the same as that in the first three classes of cases already mentioned — namely, whether the act done is of sufficient importance for the law to notice it. By this test, the distinction between putting the hand into an empty pocket or breaking into an empty building with intent to steal, either of which is an attempt, and shooting at a shadow, which is not an attempt, is that in the former cases force is actually brought to bear against the very person or object against which it was intended to be used, while in the latter no force is brought to bear or comes near being brought to bear upon the intended victim. If this explanation be correct, it should follow that if, in the case of shooting at a shadow, the person intended to be injured is near enough to the thing mistaken for him when the shot is fired, an attempt is made out. It was virtually so decided in *People v. Lee Kong*, 95 Cal. 666. A recent Missouri case is to be sustained upon the same principle. The prisoner discharged a pistol at a bed upon which he thought the prosecutor was lying. Though the prosecutor was in fact in another part of the house at the time, the defendant was held guilty of an attempt. *State v. Mitchell*, 71 S. W. Rep. 175.

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DOCTRINE OF LOST GRANT. — The law has always recognized the necessity of allowing the acquisition of an easement by long continued use. At first, immemorial use was held to be necessary and the coronation of Richard I. was taken as the limit of legal memory. See *Angus v. Dalton*, 3 Q. B. D. 85. This unsatisfactory rule was later modified by the doctrine of lost grant. By this doctrine all easements are supposed to arise in grant, but if the easement has been used for the period required by the statute of limitations to gain a title to lands by adverse possession, then the use is presumed to have commenced under a valid grant which has since been lost. See *Angus v. Dalton*, *supra*. This theory has been a source of considerable confusion in the law, for many courts have treated the lost grant as though it were to some extent a grant in fact. Thus in a recent Virginia decision the court held that the presumption of a grant to the plaintiff of a right of way over the defendant's land might be rebutted by showing that the defendant continually protested against the plaintiff's use and therefore never acquiesced in it. *Reed v. Garnett*, 43 S. E. Rep. 182. If the lost grant is considered as a grant in fact, such evidence may well show that no such grant was ever made. But the lost grant is admittedly a fiction, and to be of any value should be treated purely as a presumption of law. *Tracy v. Atherton*, 36 Vt. 503; *Reimer v. Stuber*, 20 Pa. St. 458.

The court in the principal case states that for the acquisition of a right by prescription it is necessary to show the servient owner's acquiescence. The great majority of the cases also use this word as describing one of the necessary ingredients of prescription. *Rooker v. Perkins*, 14 Wis. 79. But by the weight of authority no greater acquiescence is necessary than in the analogous cases where title to land is acquired by adverse possession. In short, the servient owner must be deemed to acquiesce if he remains inert when he knows of the plaintiff's claim and could prevent the acquisition of the right. *Daniel v. North*, 11 East, 372; *Webb v. Bird*, 13 C. B. N. S. 841; *Treadwell v. Inslee*, 120 N. Y. 458. It is difficult to see how acquiescence could be regarded as containing an affirmative element without becoming practically equivalent to permission. Though permission would be most consistent and most in harmony with the theory of an actual lost grant, yet it is well established that use of an easement by the permission of the servient owner will never ripen into a legal right. *Pierce v. Selleck*, 18 Conn. 321; *Esling v. Williams*, 10 Pa. St. 126.

There is some authority to support the principal case on the ground that verbal objection constitutes a sufficient interruption of the easement to prevent the gaining of a legal right. *Powell v. Bagg*, 74 Mass. 441. These cases go on the theory that a slight interruption should be sufficient to rebut the presumption of a grant. But this is opposed by the weight of authority which requires an actual interruption by the servient owner either through the commission of some suable act or through an action carried to a successful issue. *Kimball v. Ladd*, 42 Vt. 747; *Lehigh, etc., Co. v. McFarlan*, 43 N. J. Law 605. These cases seem correct, since if verbal objections amounted to interruptions the acquisition of any prescriptive rights would be well-nigh impossible.

Many courts have abandoned the doctrine of lost grant, and hold that rights by prescription are acquired strictly on the analogy to the acquisition of title under the statute of limitations. *Mueller v. Fruen*, 36 Minn. 273; *Okeson v. Patterson*, 29 Pa. St. 22. Such a rule has the merit not only of attaining fairer results, but also of being based upon fact rather than upon fiction.

**RIGHTS OF SURETY IN SECURITIES HELD BY CO-SURETY.**—While the right to contribution as between co-sureties is now recognized at law, its equitable origin is apparent in that it is still regulated not by strict rules of law, but by considerations of practical justice and of business convenience. *Deering v. Winchelsea*, 2 B. & P. 270. A departure from the principles usually adopted to secure those ends occurs in a late North Carolina decision. One of several sureties on a sheriff's bond had, before becoming surety, obtained security from the sheriff. Although it did not appear that the co-sureties knew of the transaction, no actual fraud toward them was shown. It was sought to bring the security into hotchpot, for the common benefit of all the sureties, but the court held that the one to whom it had been given might use it for his own separate indemnity. *McDowell County Com'rs v. Nichols et al.*, 42 S. E. Rep. 938.

Where security has been given by the principal debtor to one of several sureties after the suretyship relation has been formed, but before payment of the principal debt, the authority is overwhelming that the security enures to the common benefit, even though the result be to deprive the surety, who obtained the security, of the fruits of his diligence. *Berridge v. Berridge*, 44

Ch. D. 168. See BRANDT, SURETYSHIP, § 268. The reasons underlying this view seem to be those of practical fairness. The contrary doctrine would facilitate secret and fraudulent dealings between the principal and a favored surety, and would therefore tend to prevent the strict maintenance of the fiduciary relation in which the law places co-sureties *inter se*. See *Agnew v. Bell*, 4 Watts (Pa.) 31. It would also enable a creditor hostile to the unsecured sureties to sue them alone, leaving them to bear the burden of the obligation without having the benefit of the security. See *Lansdale's Adm'rs v. Cox*, 7 T. B. Mon. (Ky.) 401, 403. The same considerations seem applicable to that class of cases to which the principal case belongs, namely, that in which the security is given contemporaneously with the creation of the suretyship. Accordingly the weight of authority holds, in opposition to the principal case, that here, too, the security must be held for the benefit of all the sureties. *Agnew v. Bell*, *supra*; *Steel v. Dixon*, 17 Ch. D. 825. The North Carolina court, however, distinguishes the two classes of cases on the ground that a security given at the time of contracting the suretyship forms a part of the consideration of the contract of which the surety should not be deprived. It is submitted, however, that the security should nevertheless be brought into hotchpot, both for reasons suggested above and because the application of the same rule to both classes leaves the law in a more uniform state.

Cases of a third class arise when partial security or indemnity is given by the principal to one of several co-sureties after payment of the principal debt by one or more of such sureties. Here the courts hold that the surety receiving such indemnity may hold it free from the claims of his co-sureties, and that, consequently, his right to contribution from them is in no way affected by the transaction. *Gould v. Fuller*, 18 Me. 364; *cf. Harrison v. Phillips*, 46 Mo. 520; *Messer v. Swan*, 4 N. H. 481. In support of this view it may be argued that, since the creditor has been paid, he can no longer discriminate unfairly among the sureties; that the payment by the sureties has for the first time definitely fixed the amount of their claims as against each other, and that therefore the courts, in order to wind up the suretyship relation as soon as possible, insist upon a final settlement as of the time of the accrual of these definite claims. This course has the further advantage of securing to the diligent surety the full benefit of the indemnity which he has obtained. It would seem, however, that to some extent at least, these arguments may be answered. It is true that the creditor is no longer able to inflict the loss at his caprice on the unsecured sureties, but this power has merely been transferred to an equally capricious principal who, in many cases, is insolvent. The opportunities for fraud between the principal and a favored surety remain, and the rule destroys the uniformity otherwise running through the cases. It is probably the advantage of an immediate final settlement which has led the courts to adopt this rule. If accepted, however, it should be with the qualification that the partially indemnified surety be not allowed to recover from his co-sureties a sum which, added to the indemnity already paid him by the principal, exceeds the amount which he originally paid to the creditor.

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TAXATION OF PROPERTY LYING OUTSIDE THE TAXING DISTRICT. — An interesting point regarding the limits of a state's right to delegate powers of taxation is involved in the facts of a case lately before the Supreme Court

of the United States. The plaintiff floated logs down a Michigan river to a point where, during the winter, they were to lie awaiting shipment into an adjoining state in the spring. A Michigan statute provided that forest produce "in transit to some place without the state" should be "assessed at the place in this state nearest to the last boom" through which it was to pass. The plaintiff's logs were assessed under this statute while awaiting shipment, although they lay outside the limits of the village making the assessment. Action was brought to restrain the collection of the tax, on the ground that it infringed the power of Congress to regulate interstate commerce, but the court held that since the logs had not started on their final journey into the adjoining state, they had not yet become subjects of interstate commerce. *Diamond Match Co. v. Village of Ontonagon*, 23 Sup. Ct. Rep. 266.

The decision is clearly in accordance with the established law regarding interstate commerce. *Coe v. Errol*, 116 U. S. 517. It would seem, however, that the tax might have been disputed as unconstitutional because levied upon property lying outside the limits of the village which taxed it. In some instances, it is true, such taxes have been upheld upon the ground that the state, having the right to tax all property within its boundaries, may delegate this right to any of its taxing agencies, irrespective of the actual *situs* of the particular property taxed. *Conwell v. Connersville*, 8 Ind. 358; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661. It is submitted, however, that this view overlooks certain of the principles underlying taxation. The obligation to contribute to the support of government seems to be founded on the protection guaranteed by the sovereign to the rights of the taxpayer. See COOLEY, TAXATION, 2 ed., 19, 20. To some extent at least, the same principle seems applicable as between local taxing districts, even though they derive their powers from the same sovereign. To tax property for the maintenance of a local government not that of its actual *situs*, at a rate perhaps higher than that of the *situs*, seems an arbitrary imposition without due return. Accordingly the majority of cases, for varying reasons, pronounce such a tax unconstitutional. Some hold it to be taking private property "for public use without just compensation"; others consider that it violates the requirement of uniformity existing in many state constitutions. *Wells v. Weston*, 22 Mo. 384; *People v. Daniels*, 6 Utah, 288; *People v. Townsend*, 56 Cal. 633. Cf. Const. Mich. Art. xviii, § 14; Art. xiv, § 11. It would seem also arguable that such taxes are a taking of property without due process of law. See JUDSON, TAXATION, § 340. Further, it is not possible to support the tax under the circumstances of the principal case as one upon goods in transit, since for purposes of taxation the goods seem properly regarded as fully incorporated into the general mass of property at the *situs*. See *Coe v. Errol*, *supra*, 529; cf. *Hays v. Steamship Co.*, 17 How. (U. S. Sup. Ct.) 596. But even had the property been in actual transit to the defendant village, such a tax seems questionable. The principles suggested above would render it incompetent for a legislature to authorize taxation in a district which the property never has entered in the past and may never enter in the future. It is submitted that the proper place of taxation in such a case is that in which the goods were last a part of the general mass of property. This rule seems supported by the analogy of taxes upon residents. Such taxes may be levied until a change of domicile has been actually accomplished; that is, until arrival at the new domicile. *McCutchen v. Rice County*, 7 Fed. Rep. 558.



RIGHTS IN OFFSPRING OF MORTGAGED ANIMALS. — The general principle that the offspring of domestic animals belong to the owner of the mother is well settled. *Evans v. Merriken*, 8 Gill & J. (Md.) 39. See 2 BL. COM. 390. Consequently since chattel mortgages, in most jurisdictions, vest the legal title in the mortgagee, it seems that he should be entitled to the offspring although the mortgagor is in possession. There are indeed strong arguments against this view, but the weight of authority supports it. *Hughes v. Graves*, 1 Litt. (Ky.) 317; *contra*, *Shoobert v. De Motta*, 112 Cal. 215. Logically this should be extended to any descendant of the mortgaged animals, however remote. *Stewart v. Ball*, 33 Mo. App. 154. Some courts, however, have hesitated to go beyond the immediate offspring, and even in their case have made certain peculiar distinctions; for example, that the mortgage covers only the offspring already conceived, or that it includes the young only till they are weaned. *Thorpe, etc., Co. v. Cowles* 55 Iowa, 408; see *Rogers v. Highland*, 69 Iowa, 504.

The question is usually of importance not between the mortgagor and mortgagee, but with regard to the rights of innocent third persons who have dealt with a mortgagor in possession. The same problem arises in the case of a conditional sale where the vendor retains title while the vendee takes possession. In general innocent third parties will prevail over the holder of a chattel mortgage or conditional bill of sale unless the instrument has been recorded. *Funk v. Paul*, 64 Wis. 35. But it is difficult to see how the recording of a mortgage, which merely refers to the female, can be regarded as notice to third parties that the young fall under the same incumbrance. Yet a recent Georgia decision holds that the one having a recorded conditional bill of sale of a mare will be protected against the purchaser of the unweaned colt. The court intimates *obiter* that the incumbrancer would be protected only so long as the colt was unweaned. *Anderson v. Leverette*, 42 S. E. Rep. 1026. Both the decision and the *dictum* are in accord with the general law. *Darling v. Wilson*, 60 N. H. 59; *Winter v. Landphere*, 42 Iowa, 471.

The reasoning of the courts seems to be that it is necessary to prove only the facts that the mortgage or the bill of sale was recorded and that the colt was unweaned. Then will follow as presumptions of law: first, that the purchaser knew of what animal the colt was the offspring; second, that he had notice that the mother was mortgaged; third, that knowing the law, he knew that the offspring also fell under the incumbrance. Conversely the courts reason that if the offspring is weaned the purchaser will be protected whether he had actual knowledge of the facts or not. *Enright v. Dodge*, 64 Vt. 502. The fact that the offspring is weaned or unweaned is doubtless important evidence that the purchaser knew or did not know the parentage of the animal he bought. But it is submitted that is not sufficiently conclusive to be the basis of a presumption of law that a purchaser knew that the animal was mortgaged. The entire question should remain one of fact for the jury. Did the purchaser actually know the parentage of the animal he bought? In the principal case the facts seem to have justified the assumption of actual knowledge, and the decision is therefore correct.

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LIMITATIONS ON POWER OF CITIES TO INCUR INDEBTEDNESS. — The attempts to evade the constitutional and statutory limitations on municipal indebtedness have been numerous and ingenious. Certain courts have



shown an unfortunate leniency in the enforcement of such limitations, and a recent vigorous federal decision is therefore welcome. A city in Iowa, already indebted beyond the constitutional limit, authorized an issue of bonds for the construction of municipal waterworks. A special tax was to be levied to be collected annually so long as should prove necessary, the proceeds to be devoted exclusively to the payment of the bonds. The bond holders were to have the right to compel the city slightly to increase for their benefit the tax for the maintenance of the water system, but they were to have no claim against the city's general funds. The waterworks were to be mortgaged to secure the bonds. The supreme court of the state held that the bonds would not create an indebtedness within the prohibition. *Swanson v. City of Ottumwa*, 91 N. W. Rep. 1048 (Iowa). The circuit court of appeals, however, has granted an injunction against the issue. *City of Ottumwa v. City Water Supply Co.*, 119 Fed. Rep. 315 (C. C. A., Eighth Circ.).

The policy underlying limitations on indebtedness is that the taxpayers of towns should pay as they go and should not unduly burden their successors. An application of this principle seems inevitably to lead to the conclusion reached by the federal court. The city assumes an obligation by the issue of bonds, and that obligation is to be met by future taxpayers. The two special features which are relied upon to withdraw the case from the operation of the constitutional prohibition, namely, that the whole tax is levied at once though to be collected in future years, and that the remedy of the creditors is restricted to a special fund, appear immaterial when one considers the substance of the transaction. The city promises to use its taxing power till the obligation is satisfied. That it practically does in any case of incurring debt, the difference being that in this case it limits the amount which it can be forced to collect in each year. It is thus more than a trustee of special revenues, it is a debtor responsible for payment in full.

The decision of the state court is asserted to be the logical working out of the principles of previous cases. Language broad enough to cover the facts in question may undoubtedly be found, but the cases for the most part can be distinguished. It is true that a certain freedom has been allowed cities indebted up to the limit, in order that their activities should not be completely paralyzed. They may anticipate the collection of taxes to be levied for the current year, and issue warrants for ordinary expenses to be paid from these uncollected revenues. *Grant v. City of Davenport*, 36 Iowa, 396. The state court argues that as the city could thus levy a tax sufficiently large to construct an entire waterworks system and could enter into the necessary contracts before the actual collection of the money provided that the whole collection were to be made within the year, so, without creating a forbidden debt, it can extend the tax over a period of years. But the reasons for the relaxation of the prohibition in the former case do not apply to the latter. Moreover the difference in principle as shown by the effect on future taxpayers is obvious. The cases most relied on by the Iowa court are those in which contracts or bond issues are supported because the rights of the creditors are restricted to special funds, such as the receipts of a water system or special assessments against the owners of property benefited. *Quill v. City of Indianapolis*, 124 Ind. 292; *Faulkner v. City of Seattle*, 19 Wash. 320. In those cases, however, the city is under no corporate liability; it has made no promise to employ its taxing power. It is merely the agent to collect and pay over money other than the proceeds of general taxation. If special assessments are not paid the remedy is against the property

assessed and not against the city to compel further assessments. The vital distinction is that in such cases there is no burden placed upon the general taxpayers of the future as there is in the principal case. Other cases cited may be distinguished on the ground that the city was merely given an option and was not put under any obligation. *Burnham v. City of Milwaukee*, 98 Wis. 128. Though the subject is in a somewhat confused state, the decision of the federal court seems clearly justified on authority as well as right in principle. See *City of Joliet v. Alexander*, 194 Ill. 457. A contrary decision would allow cities to nullify the constitutional provisions by levying continuing taxes to provide for all obligations they wished to incur.

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DISCRETIONARY POWER OF COURTS OF EQUITY. — There is no more distinctive attribute of the power of the chancellor than the latitude of his discretion. Equitable remedies being extraordinary, they may, at the chancellor's discretion, be refused or given in order to do equity. And equity is viewed in this connection in a large sense; it is not only what is just and right as between plaintiff and defendant, but also what, according to a sound public policy, is just and right as regards the interests of the public. Thus, where the plaintiff would not otherwise have succeeded, we see equity giving relief because of the public benefit; and where the plaintiff would ordinarily have prevailed, refusing it because of the public harm. *Joy v. St. Louis*, 180 U. S. 1, 50; *Conger v. N. Y. Co.*, 120 N. Y. 29.

How far this power should be extended is involved in the consideration of a recent case, where a plaintiff sought to enjoin the infringement of his patent on bogus coin detectors. The defendant established that the plaintiff used these detectors exclusively to guard gambling machines. The court, one judge dissenting, nevertheless granted the injunction, on the ground that the "taint regarded must affect the particular rights asserted in the suit." *Fuller v. Berger*, 35 Chic. Leg. News 221 (C. C. A., Seventh Circ.). It is believed that on principle a different result should have been reached. Evidently the majority considered that the case involved only the maxim, "the plaintiff must come into equity with clean hands," and hence applied its legitimate limitation, that the wrong-doing must be connected with the transaction between the plaintiff and the defendant. *Bateman v. Fargason*, 4 Fed. Rep. 32. But the question really involved is a much broader one, and not at all one between the parties. It is the question whether equity, representing the conscience of the public, should directly assist an iniquitous undertaking. In view of the entire attitude and conception of courts of equity, the answer to this would seem to be that it should not. The principal case may be largely explained by the nature of its facts. The majority seem to have doubted whether gambling has yet become sufficiently unconscionable to warrant a refusal of relief, and, moreover, since the defendant also was using the invention for gambling, they may well have thought that the injunction would decrease, rather than aid, the objectionable practice. They cite as authority, *Brown Saddle Co. v. Troxel*, 98 Fed. Rep. 620, and *National Folding Box Co. v. Robertson*, 99 Fed. Rep. 985. But although these were patent cases in which an injunction was granted despite the fact that the plaintiff was violating the anti-trust laws, they may be distinguished. The iniquity alleged was only *mala prohibita*, and to assist a monopoly is only what a court of equity is necessarily called upon to do whenever it enforces a patent. The true rule would seem to be stated in the dissenting opinion.

“The chancellor is master of his own writ, and though the claimant hold a legal title, is under no compulsion of law to issue the writ, so long as sound consideration of public morals and conscience forbid.”

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**THE STATUTE OF LIMITATIONS IN MORTGAGE LAW.** — In discussing mortgage law the two conflicting conceptions must be noted: first, that a mortgage gives a right in land distinct and separable from the debt; and second, that it gives a mere lien wholly incidental to, and dependent upon, the debt. In states adopting the first view the mortgagee acquires a legal title, and the questions raised by the statute of limitations are comparatively simple. As it is well recognized that he has two distinct rights, one on the debt and the other against the land, the fact that the first is barred does not affect the second; and it is general law that the mortgagee may foreclose at any time, even after the debt is unenforceable. *Thayer v. Mann*, 19 Pick. (Mass.) 535. Still this is not universal law even in “title” states. *Harris v. Mills*, 28 Ill. 44.

On the other hand in states where the mortgage is considered as purely incidental, more difficult questions arise. In strict logic, if the mortgage is a mere incident to the debt, it is clear that the extinguishment or outlawing of the one should extinguish the other. This doctrine, harsh as it is upon the mortgagee, has been adopted, either by statute or at common law, in a few states. See JONES, MORT. § 1207. In Kansas and Iowa this dependence of the mortgage upon the debt is carried so far that where they have both been outlawed and the latter is revived, the former is revived also. *Schmucker v. Sibert*, 18 Kan. 104; *Clinton County v. Cox*, 37 Ia. 570. Singularly enough this extreme view is not confined to “lien” states. *Schifferstein v. Allison*, 123 Ill. 662.

In the majority of jurisdictions, however, the exact logic of the situation is not completely recognized. The mortgagee is allowed to foreclose whether the debt is barred or not — a result theoretically wrong, but obviously just. Ohio has adopted a peculiar middle ground. Though the law there is that after default the mortgagee has, as between himself and the mortgagor, the legal title, and though he can foreclose after the debt is barred, still if the statutory period has run against the mortgage as a specialty he cannot foreclose. *Kerr v. Lydecker*, 51 Oh. St. 240. This rule is rendered the more remarkable by a recent holding that the mortgagee may bring ejectment even after the debt is barred and his right to foreclose is also gone. *Bradfield v. Hale*, 65 N. E. Rep. 1008. This position seems somewhat inconsistent. If the plaintiff is entitled to maintain ejectment it means that he has the right to possession, and as by the case cited above he has the legal title it seems that he should acquire the whole estate free and clear. But so long as foreclosure is denied the land must always remain — as the court acknowledges — subject to redemption, an unfortunate result of a compromise doctrine. It seems that in “title” states nothing but twenty years adverse possession by the mortgagor should bar the mortgagee’s right to eject or to foreclose. In “lien” states the wiser course, and one which a majority of the courts have adopted, is to admit frankly that the strict theory fails, and to accomplish justice by granting the mortgagee a more than merely “incidental” right against the land.

CONDEMNATION OF MUNICIPAL PROPERTY WITHOUT COMPENSATION. — An interesting and apparently unique case has just been decided in the federal court for the district of Massachusetts. Under the general permission granted it by the state, the United States condemned part of a city park for a post-office site. The city, not owning the fee, intervened, and demanded damages on the ground that its easement was being confiscated. Refusing this request, the court ruled that the only question open was whether the park or the post-office was of greater importance to the public. If the former, then the condemnation for the purpose of the latter would be enjoined; otherwise, it would be permitted, but without compensation. Permission was granted to submit evidence upon this point. *In re Certain Land in Lawrence*, 119 Fed. Rep. 453.

It is undoubted that the legislature may authorize the condemnation of property already devoted to a public use. See LEWIS, EM. DOM. § 276. But the question of compensation does not seem to have been expressly decided before. The cases nearest in point were either determined upon a particular statute, or went off because the proper parties were not joined, or because the land owner had already accepted the Act authorizing the condemnation. *Millbury v. Blackstone Canal Co.*, 8 Pick. (Mass.) 473; *People v. Kerr*, 27 N. Y. 188; *Prince v. Crocker*, 166 Mass. 347.

Another Massachusetts case, however, holds that a city's cemetery cannot be given by the legislature to a private company without compensation. *Mt. Hope Cemetery v. Boston*, 158 Mass. 509. The decision, apparently based upon the double ground that the cemetery was held by the city in its private capacity and that the grantee was a private company, suggests two possible lines of cleavage in cases similar to the principal case. Is it decisive that the condemned land is held by the city in its public rather than in its private capacity? or that the land condemned is to be used by a governmental agency rather than by a corporation organized for gain? That is, can the state authorize the condemnation without compensation of a city park? Can it of a city hall? If it can do one or both in order to build a state prison, can it necessarily authorize a railroad to condemn either or both? The principal case in effect answers the first question in the affirmative, and a *dictum* asserts that it would make no difference that the object was to build a railroad instead of a governmental building. It was also suggested that the well recognized line drawn between property held by a city in trust for the public, such as school-houses, highways, parks, etc., and that used for its own private purposes, such as engine-houses, cemeteries, city halls, etc., might distinguish property which could be taken without compensation from that which could not. Since the loss of a park injures the general public as well as the city residents, the difficulty of the city's distributing equitably the money received as compensation is a strong reason for the result in the principal case; whereas it is obviously unfair to deprive a city of its engine-house or city hall, because the loss is direct and immediate, not to the public in general, but to the corporate body as such. On the other hand, though some courts may not consider it absolutely unreasonable that a state should condemn — without making compensation — a park, or possibly a city hall, to erect a prison or hospital, it must seem unjust to permit a railroad to condemn such property without paying for it. The cases upon the point are necessarily rare, as it is most extraordinary for a state to condemn public land without the consent of the municipality that owns it.

## RECENT CASES.

**BANKRUPTCY — DEBTS NOT DISCHARGED — JUDGMENT FOR ALIENATION OF AFFECTIONS.** — *Held*, that alienation of the affections of a husband is a "wilful and malicious injury to the person" within the meaning of § 17 of the Bankruptcy Act of 1898, and therefore that proceedings under the act do not discharge a judgment obtained in an action for such alienation of the affections. *Leicester v. Hoadley*, 71 Pac. Rep. 318 (Kan.). For a discussion of a similar decision concerning a judgment for libel, see 16 HARV. L. REV. 62.

**BANKRUPTCY — EFFECT OF NATIONAL ACT UPON STATE LAWS.** — The defendant to a petition in insolvency filed under a state law was "a person chiefly engaged in farming or tillage of the soil." The national bankruptcy act of 1898 provides in § 4 b that such persons shall not be adjudged involuntary bankrupts. *Held*, that the defendant, being thus exempted from the scope of the national act, is still subject to the state insolvency law. *Old Town Bank v. McCormick et al.*, 53 Atl. Rep. 934 (Md.). For a discussion of the principle involved, see 16 HARV. L. REV. 301.

**BANKRUPTCY — EXEMPTIONS — STATE LAWS.** — Pennsylvania state decisions hold that a seat on the Philadelphia Stock Exchange is not property subject to execution. A Pennsylvania bankrupt claimed that under these decisions, by § 6 of the Bankruptcy Act allowing the exemptions prescribed by state laws, his seat was exempt. *Held*, that the seat was not exempt, the federal courts not being bound by state decisions which are mere declarations of general law defining property. *Page v. Edmunds*, 23 Sup. Ct. Rep. 200.

This case seems to be the first raising the question of what are state laws prescribing exemptions. The language of the court would seem to indicate that federal courts are not bound by state decisions as to exemptions when no statute is interpreted, but may, in accordance with the doctrine of *Swift v. Tyson*, follow their own views as to the law of the state. This doctrine, however, does not seem essential to the decision of the principal case; for since the decisions in question do not admit that the seat is *prima facie* subject to the claims of creditors and then excuse it from such liability, but merely deny that it is such property as to be subject to levy, they are not truly decisions prescribing exemptions. Thus the state decisions, even if considered as representing the state law, would be correctly held not binding under the Bankruptcy Act. By federal authorities the seat would clearly pass. *Sparhawk v. Yerkes*, 142 U. S. 1; *Re Page*, 107 Fed. Rep. 89.

**BILLS AND NOTES — CHECKS — HONOR OF CHECK AFTER DEATH OF DRAWER.** — The plaintiff's testator made a gift of his check to his son to be collected after his death. The drawee bank, knowing of the decease of the drawer, honored the check. *Held*, that the bank must pay the amount of the check to the personal representatives of the drawer. *Pullen v. Placer County Bank*, 71 Pac. Rep. 83 (Cal.).

It is usually assumed by the text-writers, though there is no decision on the point, that a check, even when given for value, cannot be collected after the drawee has knowledge of the drawer's death. BYLES ON BILLS, 3d Am. ed. 17; *contra*, MORSE, BANKS AND BANKING, 4th ed. § 400. So also a check given *causa mortis* cannot be collected after death. *Tate v. Gilbert*, 2 Ves. Jr. 117. The decision in the principal case would seem a logical conclusion, but no exact authority has been found. On the other hand, however, a check is a "bill of exchange." NEG. INST. LAW (Eng.) § 73; (Am.) § 185. In the hands of an indorsee for value or of a *bona fide* creditor a bill may be accepted by the drawee, even though he knows of the drawer's death. *Cutts v. Perkins*, 12 Mass. 206; DANIELS, NEG. INST. §§ 491, 498 a. The same rule might well be applied even though the payee or holder of the paper is a volunteer. The law of gifts is, however, *contra*. If the subject of the gift is money, the gift is incomplete at death; if it is an order on the drawee, revocable in its nature, the death of the drawer might reasonably be held to operate as a revocation. See *contra*, 14 HARV. L. REV. 588.



**BILLS AND NOTES—STATUTE OF LIMITATIONS—DEMAND NOTE.**—The defendant made his promissory note dated February 16, 1893, payable "on demand after date at 1 Broadway." On February 16, 1899, the plaintiff as assignee commenced his action. The New York statute of limitations is six years. *Held*, that the statute is no bar to the action. *Hardon v. Dixon*, 77 N. Y. App. Div. 241.

The court rests its decision on two grounds: first, that the note did not mature until the day after date; and second, that if it did, the maker was not in default until the following day. As to the first point, the court seems to give the language of the note its reasonable meaning, but the little authority found is *contra*. *Fenno v. Gay*, 146 Mass. 118. As to the second point, ordinarily the maker is not in default until the day after maturity. *Kennedy v. Thomas*, [1894] 2 Q. B. 759. Many courts, however, hold that failure to pay on presentment on the day of maturity puts the maker in immediate default. *Veazie Bank v. Winn*, 40 Me. 62; *contra*, *Kennedy v. Thomas*, *supra*. The principal case might seem to fall within this latter holding, although no presentment appears, for generally no presentment for payment is necessary before bringing action on a demand note. *Norton v. Ellam*, 2 M. & W. 461; *Jillson v. Hill*, 4 Gray (Mass.) 316. But this is held not to apply where, as in the principal case, payment is to be made at a particular place. *Sanderson v. Bowes*, 14 East, 500. Therefore it would seem that, in the absence of a demand to put the defendant in default on the day of maturity, the decision is sound on the second point.

**CONFLICT OF LAWS—JURISDICTION FOR DIVORCE—APPEARANCE OF PARTIES.**—X, a citizen of Massachusetts and domiciled in Boston, went to South Dakota and resided there the number of months necessary to acquire domicile according to the South Dakota law. He then brought suit for divorce. His wife entered an appearance, and the divorce was granted. X at once returned to Massachusetts, and thereafter married again. After the death of X, both the first wife and the second wife asked to be appointed administratrix. *Held*, that the divorce granted in South Dakota is void, for neither party being domiciled there, the courts had no jurisdiction, and could not obtain it by the appearance of the parties. *Andrews v. Andrews*, 23 Sup. Ct. Rep. 237.

It is a general rule of the common law that the court of the domicile alone can grant a valid divorce. *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. It has been held by the United States Supreme Court that the requirement of domicile is not satisfied by residence in a state for the length of time prescribed by the state for the acquirement of domicile; but that there must be such domicile as is recognized by all nations, *i. e.* residence *animo manendi*. *Bell v. Bell*, 181 U. S. 175. But it is sufficient if one of the spouses is *bona fide* domiciled in the state granting the decree. *Atherton v. Atherton*, 181 U. S. 155. The question of the principal case, though raised, has not been decided before. See *Streitwolf v. Streitwolf*, 181 U. S. 179. The decision seems correct. Marriage is something more than a contract; it is a *status*. Jurisdiction for divorce, therefore, is not a personal jurisdiction but a jurisdiction *quasi in rem*. See 15 HARV. L. REV. 66. If a state has not jurisdiction over the *res*, the marriage, jurisdiction over the persons cannot cure the defect.

**CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—REGULATION AS TO WAGES.**—An Indiana statute prohibits the assignment of future wages by employees, and declares invalid any agreement whereby an employer is relieved from weekly payment of full wages to an employee. Acts 1899, p. 193, § 4. *Held*, that the statute is valid under the state and federal constitutions. *International Text-Book Co. v. Weissinger et al.*, 65 N. E. Rep. 521 (Ind., Sup. Ct.).

It is now well settled that the constitution guarantees a right to freedom of contract. *Allgeyer v. Louisiana*, 165 U. S. 578, 589. But this right is subject to regulation by the legislature in the exercise of the so-called police power. *Holden v. Hardy*, 169 U. S. 366, 391. The constitution is infringed only when the limitations on the legislative power, such as are indicated in the Fourteenth Amendment by requiring due process of law, are exceeded. But due process of law admittedly requires nothing more than a proper conformity with fixed principles of justice. See *Tyler v. Judges*, 175 Mass. 71; *Hurtado v. California*, 110 U. S. 516, 532. It cannot be said that there is anything arbitrary or unjust in the Indiana statute in view of the conceivable prejudice to the community resulting from the improvident contracts which it forbids. The decision, in assuming a liberal attitude towards the judgment of the legislature, is in contrast to the prevailing tendency of the state courts, but accords with the better view of the federal rulings. See *State v. Loomis*, 115 Mo. 307; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

**CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—LEGISLATIVE CONTROL OF MUNICIPAL CONTRACTS.**—A statute provides that all laborers employed upon public



works of the state or any political subdivision thereof shall be employed for only eight hours per day. 94 Ohio Laws, 357 (1900). *Held*, that the statute is unconstitutional as interfering with the right of municipal corporations to freedom of contract. *City of Cleveland v. Clements Bros. Construction Co.*, 65 N. E. Rep. 885 (Ohio).

This decision is an illustration of the unfortunate inclination of the state courts to limit narrowly the regulation of contracts by the legislatures. (See preceding discussion.) But even though it is improper for the legislature to regulate thus the terms of contracts made by individuals, some courts hold that municipal corporations, as mere agents of the state, are subject to its direction as to the manner in which they shall contract. See *Re Dalton*, 61 Kan. 257. There are statements that they are subject to absolute control. *Mayor of Frederick v. Grashon*, 30 Md. 437. But the better considered decisions usually recognize that the nature of municipalities is twofold. *People v. Coler*, 166 N. Y. 1; *Atkins v. Town of Randolph*, 31 Vt. 226. Although subject to control in so far as they exercise delegated governmental powers, they fulfil a further function as the representatives of their inhabitants, in which capacity they enjoy private rights, exempt from state interference. Consequently statutes regulating municipal contracts must stand on the same basis as those of general application.

CONSTITUTIONAL LAW — POLICE POWER — MUNICIPAL REGULATION OF STREET RAILWAYS. — *Held*, that a city ordinance requiring existing street railway companies to pave and keep in repair the space between their rails and tracks, and one foot on each side, is not a valid exercise of the police power. *Fielders v. North Jersey St. Ry. Co.*, 53 Atl. Rep. 404 (N. J., C. A.).

*Held*, that a city ordinance requiring existing street railway companies to clean the street between their rails is within the police power. *City of Chicago v. Chicago Union Traction Co.*, 65 N. E. Rep. 243 (Ill., Sup. Ct.). See NOTES, p. 436.

CONSTITUTIONAL LAW — TAXATION — GOODS IN TRANSIT. — A Michigan statute provided that forest produce which on the assessment day was in transit to a point without the state, should be assessed "at the place in this state nearest to the last boom" through which it was to pass. The plaintiff had floated logs down a Michigan river to a point where they were to lie through the winter, awaiting shipment in the spring to a destination without the state. While lying at this point, they were assessed by the village nearest the last boom. At the time they had not yet come within the limits of that village. Suit was brought to restrain collection of the tax. *Held*, that it is competent for the legislature to prescribe this mode of assessment and the tax does not infringe the commerce clause of the Federal Constitution. *Diamond Match Co. v. Village of Ontonagon*, 23 Sup. Ct. Rep. 266. See NOTES, p. 440.

CONSTITUTIONAL LAW — TAXATION — STATE TAX ON FOREIGN HELD STOCK. — The statutes of Maryland provide that corporations shall be taxed by taking the value of their stock, deducting the value of real estate taxed independently, and taxing the sum remaining to the stockholders. Code, Art. 81, § 141. This tax is to be collected from the corporation. The plaintiff, a non-resident stockholder, sought to enjoin the collection of the tax. *Held*, that the tax is constitutional. *Corry v. Mayor of Baltimore*, 53 Atl. Rep. 942 (Md.).

The *situs* of choses in action by the better view, is at the domicile of the creditor, and there only they can be taxed. See 15 HARV. L. REV. 680. Thus a state tax upon bonds owned by non-residents was held unconstitutional. *State Tax on Foreign Held Bonds*, 15 Wall. (U. S. Sup. Ct.) 300. This rule is not in fact broken by the tax in the principal case. The tax upon the stock is merely one method of estimating and reaching the whole property of the corporation, and despite its form it is really not a tax upon the choses in action held by the stockholders. See *Town of St. Albans v. National Car Co.*, 57 Vt. 68. If the property of the corporation had already been taxed at its full value, so that the tax upon the stock as such, fell upon the foreign stock-holders, it would seem inconsistent with the rule above stated. Such a tax, nevertheless, has been sustained. *Street Ry. Co. v. Morrow*, 87 Pa. St. 406. The tax in the principal case, however, although perhaps awkwardly worded, seems clearly unobjectionable. The decision is supported by considerable authority. *Tappan v. Merchant's Nat'l Bank*, 19 Wall. (U. S. Sup. Ct.) 490; *Faxon v. McCosh*, 12 Ia. 527.

CORPORATIONS — STOCKHOLDER'S RIGHT TO PROTECT CORPORATE INTERESTS — SUIT BY ASSIGNEE OF ACQUIESCING STOCKHOLDER. — A director in a corporation had negligently permitted mismanagement of its affairs. The plaintiff, an innocent assignee of his stock, sued the wrongdoers, making the corporation a party. *Held*, that the plaintiff is not barred by the acquiescence of her assignor. *Warren v. Robison*, 70 Pac. Rep. 989 (Utah).

A stockholder who has not acquiesced in misconduct towards the corporation may, if the directors refuse to act, proceed in equity for redress. *Farmers' Loan & Trust Co. v. N. Y. & Northern R. R. Co.*, 150 N. Y. 410. On the other hand a stockholder who has acquiesced is barred from such relief. *Burt v. British Association*, 4 De G. & J. 158. See 1 MOR. CORP. 2nd ed. § 262. That the bar is merely personal, however, and does not attach to the shares of such stockholder, seems to be indicated from the rule allowing him to share *pro rata* in sums recovered for the corporation, if a going concern, through the action of the other stockholders. See *Brown v. De Young*, 167 Ill. 549, 556; 1 MOR. CORP. 2nd ed. § 262. Moreover, this *prima facie* right of a stockholder to protect corporate interests is not barred, in the case of an assignee of a non-acquiescing stockholder, though the assignee took with knowledge of the wrongs or even with the purpose of redressing them. *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Seaton v. Grant*, L. R. 2 Ch. App. 459. In the case, then, of the innocent assignee of an acquiescing stockholder, no consideration of public policy would seem to require that his right should be barred. The principal case reaches the desirable result that all shares in a going concern confer equal *prima facie* rights, which can be cut down only by a personal bar against the holder of the shares. *Parsons v. Joseph*, 92 Ala. 403.

CRIMINAL LAW — ATTEMPT TO COMMIT MURDER. — The defendant shot through a window at a bed upon which he supposed the prosecutor to be lying. In fact, the latter was in a different part of the house. *Held*, that defendant was guilty of an attempt to murder. *State v. Mitchell*, 71 S. W. Rep. 175 (Mo.). See NOTES, p. 437.

CRIMINAL LAW — HIGH TREASON — NATURALIZATION IN ENEMY'S COUNTRY. — A British subject was indicted for treason in adhering to the King's enemies. He pleaded in defense that the acts complained of were committed after he had become a naturalized citizen of the South African Republic. *Held*, that naturalization during war is no defense. *The King v. Lynch*, 19 T. L. R. 163 (Eng., K. B. Div.).

There would seem to be no doubt that in the absence of treaty, a sovereign may punish a subject who returns within his jurisdiction after naturalization in another state, for the state granting naturalization has no power to absolve him from his obligations. *Tousig's Case*, LAWRENCE'S WHEATON, 929. Nor will the commission of a foreign prince be a bar to a prosecution for high treason. *Macdonald's Case*, COCKBURN, NATIONALITY, 64, *note*. It was argued in the principal case that, though this was true while England maintained the doctrine of perpetual allegiance, it was no longer law, since by sec. 6 of the Naturalization Act of 1870, a British subject who becomes naturalized in a foreign state ceases to be a British subject, and is regarded as an alien. It would seem to be obvious that this defense, as applied to the principal case, is unsound. Naturalization is illegal, as are all other contracts made with the enemy in time of war. *Cf. The Hoop*, 1 Rob. 196. Even aside from this technical ground, it would seem that being naturalized by a hostile nation in war time is in itself an act of treason, for it furnishes the enemy with another subject. Any other decision would encourage treason.

CRIMINAL LAW — LARCENY — WILD ANIMALS. — The defendant was indicted for the larceny of fish taken from a pound net in Lake Erie. The fish had entered the net by a funnel-shaped opening which was never closed. Storms frequently so disturb the nets that fish escape. *Held*, that the fish were sufficiently reduced to possession to be the subject of larceny. *State v. Shaw*, 65 N. E. Rep. 875 (Ohio).

Wild animals are not the subject of property until brought within the actual possession, custody, or control of the one claiming ownership. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75. Few cases illustrate what is sufficient reduction to possession. See *Young v. Hichens*, 6 Q. B. 606. The principal case seems clearly right in saying that it is enough if escape is practically impossible, though not absolutely so. A test requiring absolute impossibility of escape would be impractical. The question is essentially one of degree to be determined on the facts of each case. See *Pierson v. Post*, 3 Cai. (N. Y.) 175. In the principal case the chance that any specific fish would escape was very slight and was properly disregarded. 2 BISH. CR. L. § 775 (7th ed.); 2 RUSS. CR. 247.

CRIMINAL LAW — SENTENCES — DISCHARGE BY IMPRISONMENT UNDER DIFFERENT SENTENCE. — The petitioner had been sentenced by a federal court to five years' imprisonment in a penitentiary in Kansas. The marshal of the court, instead of conveying the prisoner there, surrendered him to the marshal of another district, where he was tried for another offence, convicted, and sentenced for life. He was imprisoned in the Ohio State penitentiary. Five years later he was pardoned for this second

offence, and was then taken back to serve the first sentence. He sued out a writ of *habeas corpus*. *Held*, that he had served this sentence by his term of imprisonment in Ohio. *In re Jennings*, 118 Fed. Rep. 479 (Circ. Ct., E. D. Mo.).

The court's argument is that the sentence was to commence at once; that the marshal, being only a ministerial officer, had no authority to postpone its execution, and that consequently it must have run out during the imprisonment in Ohio. There are, however, forcible arguments for the contrary view. A prisoner while serving his sentence may be tried, convicted, and sentenced for a separate offence. *State v. Connell*, 49 Mo. 282. And if sentenced to a term of imprisonment, though in the same jurisdiction, this term and that which he was formerly serving will not run concurrently but successively. *Ex parte Brunding*, 47 Mo. 255. Although a sentence thus imposed during the term of imprisonment seems ordinarily to be for some crime committed by him while in confinement or during an escape, there seems no reason that the time of the commission of the crime should make a difference. There is also the difficulty that here it was sought to impose the first sentence after the execution of the second. But it is submitted that the inversion does not injure the prisoner in such manner as to entitle him to be subsequently excused from serving his former sentence. A prisoner is not entitled to be discharged if the imprisonment which he has suffered has not in fact been in execution of his sentence. *Stokes v. Warden*, 60 N. Y. 342. Of the cases found, the one most nearly in point accords with this latter view. See *Sartain v. State*, 10 Tex. Cr. App. 651.

**EQUITY — INJUNCTION — PATENT PUT TO ILLEGAL USE.** — The plaintiff sought to enjoin the defendant from infringement of his patent on detectors of bogus coins. The defendants established that the plaintiff used these detectors exclusively to guard gambling-machines. *Held*, that plaintiff is entitled to an injunction. *Fuller v. Berger*, 35 Chic. Leg. News, 221 (C. C. A., Seventh Circ.). See NOTES, p. 444.

**EQUITY — RESCISSION OF CONTRACT — MISTAKE OF FACT.** — The plaintiff, the beneficiary under a life insurance policy, agreed to assign his interest to the defendant. Both parties were ignorant of the fact that the insured was already dead. The defendant learned of the death before the assignment, but concealed his knowledge. *Held*, that the assignment may be set aside. *Scott v. Coulson*, 19 T. L. R. 162 (Eng., Ch. D.).

The fact that one party learned of the death of the insured before the completion of the contract is immaterial, since equity will rescind a contract, though the mistake is not mutual. *Diman v. Prov., etc., Ry. Co.*, 5 R. I. 130. Nor is there any difference between an executory and an executed contract, provided the parties can be put in *statu quo*. *Paine v. Upton*, 87 N. Y. 327. But mere lack of knowledge of extrinsic facts which only make the thing sold more or less valuable is no ground for equity to interfere in any case. *Laidlaw v. Organ*, 2 Wheat. (U. S. Sup. Ct.) 178. On the other hand, the destruction of the thing to be sold is sufficient ground, as in the case of a contract to sell a remainder in ignorance of the fact that the tenant in tail had barred the estate. *Hitchcock v. Giddings*, 4 Price, 135. And even a substantial difference between the real and the intended subject matter of the contract is enough, as in the sale of an estate which both parties believed to be a freehold when in fact it was a copyhold. *Hart v. Swaine*, 7 Ch. Div. 42. It seems that the principal case was rightly put in the latter class, since an absolute contract right is a substantially different thing from a contingent one. *Allen v. Hammond*, 11 Peters (U. S. Sup. Ct.) 63.

**EQUITY — SPECIFIC PERFORMANCE — CONTRACT TO DEVISE LANDS FOR PERSONAL SERVICES.** — The plaintiff came to live with, and work for his uncle, who contracted orally to devise his lands to the plaintiff in return for his services. After seventeen years the uncle died without making a will, and without any rights of third parties intervening. *Held*, that the plaintiff was equitably entitled to the estate. *McCabe v. Healy*, 70 Pac. Rep. 1008 (Cal.). For a discussion of the principle involved, see 14 HARV. L. REV. 64.

**EVIDENCE — BURDEN OF PROOF — FIRE FROM NEGLIGENCE OF RAILROAD.** — It was shown by a preponderance of evidence that a fire was caused by sparks from one of the defendant's engines. The lower court charged that the burden was on the defendant to show that the escape of the sparks was not due to negligence. *Held*, that the charge is erroneous, since the defendant has not the burden of proof on all the facts, but merely the duty of bringing forward evidence to rebut the presumption of negligence. *Galveston, etc., Ry. Co. v. Chittim*, 71 S. W. Rep. 294 (Tex., Civ. App.).

This decision limits the rule laid down in a previous Texas case. For a discussion of the latter case, see 15 HARV. L. REV. 74.

**EVIDENCE — PROOF OF FOREIGN LAW — DECISIONS OF INFERIOR COURTS IN FOREIGN JURISDICTION.** — *Held*, that the construction of the New York recording act by inferior courts of New York will not be accepted in Pennsylvania as representing the New York law. *Schmalts v. York Mfg. Co.*, 53 Atl. Rep. (Pa.) 522.

The interpretation placed upon statutes by the highest court of another state is ordinarily taken as conclusive evidence of the law of that state. *Secombe v. R. R. Co.*, 23 Wall (U. S. Sup. Ct.) 108; *Van Matre v. Sankey*, 148 Ill. 536. The principal case, however, refuses to assign similar weight to the decisions of inferior courts and rejects their interpretation on the ground that it seems incorrect and undesirable and is contrary to the decision of the supreme court of New Jersey upon a similar statute. See *Knowles' Loom Works v. Vacher*, 57 N. J. Law, 490. It may be admitted that the decision of a lower court is merely evidence of foreign law. *Gilchrist v. W. Va. Oil Co.*, 21 W. Va. 115. Nevertheless it would seem that unless it appears inconsistent with other decisions in the jurisdiction, or is clearly unreasonable, it should be accepted as representing the law. Decisions in New Jersey would seem valueless in the determination of New York law. Moreover, the refusal to follow the decisions of New York inferior courts necessarily introduces an element of uncertainty into transactions in that state which may be adjudicated upon elsewhere. In the principal case, therefore, the reasons urged seem insufficient to justify the refusal to adopt the conclusion of the lower court of New York. No decisions involving the exact point have been found.

**INSURANCE — CO-INSURANCE CLAUSE — APPORTIONMENT OF LOSS.** — The plaintiff was insured under several policies, all of which had the usual "apportionment clause" and some the "percentage co-insurance clause." The insurance and the loss were each less than eighty per cent of the value of the property. *Held*, that in estimating the "whole amount of insurance" the face values of all the policies should be added. *Stephenson v. Agricultural Ins. Co.*, 93 N. W. Rep. 19 (Wis.). *Farmer's Feed Co. v. Scottish Union, etc., Ins. Co.*, 173 N. Y. 241.

The result of these decisions seems unfortunate. Though the insurance on the property exceeded the actual loss, the insured was not completely indemnified. *Cf. Chesbrough v. Home Ins. Co.*, 61 Mich. 333. The conclusion of the courts is based solely on the construction of the "apportionment clause" which provided that the "company shall not be liable for a greater proportion of the loss than the amount hereby insured shall bear to the whole insurance effected on the property." If the face value of those policies which contained the "co-insurance clause" is used to estimate the "whole insurance," the result reached cannot well be avoided. But the "co-insurance clause" might well be construed as a condition subsequent which would operate to make the actual amount covered by the policy containing it less than its face value. This smaller sum would then seem to be the true value of the policy in the circumstances of the principal case. See *Armour Packing Co. v. Reading Fire Ins. Co.*, 67 Mo. App. 215. Only this amount, therefore, should be considered in estimating the whole insurance on the property. By this construction, the insured would receive complete indemnity from the insuring companies. No other authorities have been found.

**INSURANCE — CONDITIONS — FAILURE TO GIVE NOTICE WITHIN STIPULATED TIME.** — A policy provided that the company should not be liable unless the insured should give notice of an accident within ten days thereafter. The insured was incapacitated by his injuries from giving notice within the time fixed, but did so as soon as he was able. *Held*, that he may recover on the policy. *Comstock v. Fraternal Accident Ass'n*, 93 N. W. Rep. 22 (Wis.).

A policy provided that failure to give notice of the accident causing disability or death within fifteen days of the date of the accident should render void all claims under the policy. The insured sustained an injury which he considered trivial but from which he afterwards died. The cause of his death was not known until an autopsy was performed, whereupon notice was given. *Held*, that the beneficiary may recover. *Rorick v. Ry. Officials, etc., Ass'n*, 119 Fed. Rep. 63 (C. C. A., Ninth Circ.).

The doctrine has been laid down that conditions in insurance policies to be performed by a beneficiary after the accident or death will be more leniently construed than those to be performed before. See *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389. Since by the express terms of the policy, all conditions are equally conditions precedent, it is hard to justify the distinction. Several courts, however, have applied it in holding that failure to give notice of the accident within the fixed time prescribed will not, under circumstances similar to those in the principal cases, prevent recovery. *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Association v. Earl*, 16 C. C. A. 596. In other jurisdictions exact performance of the conditions is required. *Gamble v. Accident Ass*

*Co.*, 2 Big. L. & A. Ins. Ca. 681 (Ireland). On strict legal principle only the latter view is tenable. Contrary decisions illustrate the tendency of some American courts to sacrifice principle to the apparent justice of the case.

**INSURANCE — LIFE INSURANCE — INSURED EXECUTED FOR MURDER.** — The insured was convicted of murder and hanged. The policy contained no express provision as to death resulting from crime. The beneficiaries brought suit on the policy, alleging that the insured had been wrongfully convicted and executed. *Held*, that, even if this allegation is true, there can be no recovery. *Burt v. Union, etc., Ins. Co.*, 23 Sup. Ct. Rep. 139.

An express promise to indemnify for the consequences of crime is clearly unenforceable. *Arnold v. Clifford*, 2 Sumn. 238 (U. S. Circ. Ct.). It would seem to make no difference that the promise is impliedly included in a wider contract of indemnity. Consequently, where the insured was admittedly guilty of a capital crime a policy was held to be unenforceable. *Amicable Soc. v. Bolland*, 4 Bli. N. S. 194. This case, apparently the only one on the exact point, was approved by the Supreme Court when it held a policy invalidated by the suicide of the insured while sane, on the ground that this also was a crime. *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139; see *contra*, *Fitch v. American, etc., Co.*, 59 N. Y. 557. The principal case seems to be the first in which the insured was admittedly innocent. To enforce the policy here is merely to enforce an indemnity against death by a miscarriage of justice. Such a contract, however, also seems against public policy, as tending to affect the administration of justice. See LEAKE, CONTR. 3rd ed. 626. A contrary view would open the judgments of criminal courts to collateral investigation.

**INSURANCE — WIFE AS BENEFICIARY — SECOND WIFE'S INTEREST.** — The insured had taken out a policy for the benefit of his wife and children. It is provided by 45 & 46 Vict., c. 75, § 11, that such a policy "shall create a trust in favor of the objects therein named." The insured's wife subsequently died, and he remarried. The second wife, and children of both marriages survived him. *Held*, that the surviving wife and all surviving children take under the policy. *In re Browne's Policy*, 19 T. L. R. 98 (Eng., Ch. D.).

The question raised is: with what intention did the deceased use the words "wife," and "children"? As to the latter, he must have recognized the possibility of having children in the future, and it is reasonable to suppose that he intended the word to include such of them as should survive him. *Roquemore v. Dent*, 33 So. Rep. 178 (Ala.). But in using the word "wife" a married man would naturally intend his present wife, and it is improbable that the possibility of another marriage occurred to the insured at the time he took out his policy. See *Pratt v. Matthew*, 22 Beav. 328, 334. The court practically admits this, and seems to construe the word as it considers the testator would have intended it, had he known that he was to have a second wife. Such a method of construction, it is submitted, is not to be supported. No case exactly in point was found, but a legacy "to my beloved wife" was held to lapse with the death of the first wife. *Garrat v. Niblock*, 1 R. & M. 629; see *Franks v. Brooker*, 27 Beav. 635.

**JUDGMENTS — COLLATERAL ATTACK ON JURISDICTION — SURROGATE'S COURT.** — In order to confer jurisdiction upon the New York courts, a watch and chain belonging to the intestate, who was domiciled in Connecticut, was brought to New York after his death. Upon this basis the surrogate's court granted administration to the plaintiff, the public administrator. He then commenced the present action against the defendant for causing, in Connecticut, the intestate's death. The defendant attacked the jurisdiction of the court on the ground that the surrogate's decree was obtained by fraudulent practice. *Held*, that the decree was subject to collateral attack on the grounds alleged. *Hoes v. N. Y. N. H. & H. R. R.*, 173 N. Y. 435.

By the general rule, with which the New York law is in accord, the judgments of courts of record having probate jurisdiction are entitled to the same presumptions in favor of their assumed jurisdiction as courts of general power. *People v. Medart*, 166 Ill. 348. Although the jurisdiction of a foreign court is generally subject to collateral attack, yet by the weight of authority the presumption in favor of the jurisdiction of domestic courts of general powers is conclusive as against collateral attack, unless the lack of jurisdiction appears affirmatively upon the record. *Coit v. Haven*, 30 Conn. 190; *Reinhardt v. Nealis*, 101 Tenn. 169. But the New York courts have gone far beyond those of the other states in allowing collateral attack on the jurisdiction, since they subject the judgments of a domestic court of general powers to collateral attack even where its jurisdiction appears affirmatively upon the record. *Ferguson v. Crawford*, 70 N. Y. 253. So while the case appears to be sound



law in New York on the statutes and authorities cited in the opinion, it is questionable whether it would be generally followed. It is valuable as protecting the New York courts, to a certain extent, from a threatened abuse by which they were subject to the necessity of hearing claims for death arising in any neighboring state.

**JUDGMENTS — MISNOMER OF PARTNERSHIP AS CORPORATION — LIABILITY OF PARTNERS.** — The plaintiff sued a partnership, describing it as a corporation. Judgment was recovered as against the corporation, the partners having appeared and pleaded to the merits without denying their corporate existence. The plaintiff now sues in equity to charge the individual partners with the judgment. *Held*, that the judgment does not bind them. *Pittsburg Sheet Mfg. Co. v. Beale*, 53 Atl. Rep. 540 (Pa.).

The decision seems sound and is of interest in suggesting a very reasonable limitation upon the rule that a misnomer of a defendant in a judgment will not invalidate the judgment when the proper party has been served. See *Guinard v. Heysinger*, 15 Ill. 288. The principle underlying this rule is that the party bound by a judgment is the actual person within the contemplation of the court, regardless of his name. *Parry v. Woodson*, 33 Mo. 347. Ordinarily, under this rule, individual partners are bound by a judgment against the firm, though the firm is not correctly named. *Bailey v. Crittenden*, 44 S. W. Rep. 404 (Tex.). But in the principal case the court intended to bind, not the defendants, but a distinct legal entity, the corporation, and so the case is beyond the reason, and should be without the application of the rule. Nor can the defendants be held on the principle of estoppel, for in admitting their corporate existence, they have denied, not asserted, their individual liability.

**LIMITATION OF ACTIONS — TORTS — CONSEQUENTIAL DAMAGE.** — The defendant in performing a surgical operation on the plaintiff negligently left a sponge in the wound. Thereafter the statutory period for actions for malpractice had run. During this time the plaintiff consulted the defendant but was not treated by him. *Held*, that the action is not barred by the statute of limitations. *Tucker v. Gillette*, 22 Ohio Circ. Ct. Rep. 664. Affirmed by an evenly divided court, *Gillette v. Tucker*, 65 N. E. Rep. 865 (Ohio).

The undoubted liability for the original negligence was barred by the statute of limitations, and since no subsequent independent act of negligence could be inferred from the evidence, the defendant's tort was necessarily considered by the affirming judges as a continuing act of negligence. Strictly, however, it was only the injurious consequences which were continuous, and it is almost universally held that the statutory period is not extended by consequential damage if there is an immediate right of action. WOOD, LIMITATIONS, § 178. *Wilcox v. Plummer*, 4 Pet. (U. S. Sup. Ct.) 172. The result reached by the court therefore seems difficult to support. Though the plaintiff's ignorance of the defendant's tort will not extend the statutory period, it would seem just to make a special exception where the defendant had the later legal duty of discovering his own negligence. But no authority has been found for such a doctrine. Cf. WOOD, LIMITATIONS, § 49.

**MORTGAGES — FORECLOSURE BARRED BY STATUTE OF LIMITATIONS — EJECTMENT.** — A mortgagee whose debt and right to foreclose were barred by statutes of limitations brought ejectment against the mortgagor's successor. *Held*, that he may recover in ejectment. *Bradfield v. Hale*, 65 N. E. Rep. 1008 (Ohio). See NOTES, p. 445.

**MUNICIPAL CORPORATIONS — LIMITATION ON POWER TO CREATE INDEBTEDNESS.** — A city already indebted up to the constitutional limit, authorized an issue of bonds for the construction of a water works system. The bonds were to be paid by a special annual tax, and were to give no right against the general funds of the city. *Held*, that such bonds would create an indebtedness within the meaning of the constitutional provision. *City of Ottumwa v. City Water Supply Co.*, 119 Fed. Rep. 315 (Iowa). See NOTES, p. 442.

**PRACTICE — JOINDER OF PARTIES — DECEASED OBLIGOR OF JOINT NOTE.** — The plaintiff sued on a joint note, joining as defendants the representative of a deceased obligor and the surviving obligors. § 758 of the New York Code provides that the estate of a person jointly liable on a contract shall not be discharged by his death. *Held*, that the plaintiff may not join the deceased's estate in his action on the note, unless he prove that the survivors are insolvent or have a legal defense. *Potts v. Dounce*, 173 N. Y. 335.



The court holds that the effect of the statute is to allow recovery against the deceased's estate at law, but only upon the same proof as was formerly required in equity. *Cf. First Nat. Bank v. Leuk*, 123 N. Y. 638. But since, in any case, recovery can be had against the solvent survivors and they having paid can in equity compel contribution from the estate of the deceased, § 758 could well be construed to provide the simple method of settling the whole matter in one action. That practice has been followed in several of the other code states under similar provisions. *Lawrence v. Doolan*, 68 Cal. 309; *Hudelson v. Armstrong*, 70 Ind. 99. The section in question, however, would seem from its position in the Code to be confined in its application to cases where the party dies pending the action. The result in the principal case might perhaps be sustained on this ground, though this was not mentioned in the decision. *Cf. In re Robinson's Will*, 57 N. Y. Supp. 502.

**PROPERTY — EASEMENTS — IMPLIED RESERVATION.** — The defendant built a railroad across its own land, with side ditches so constructed as to throw water upon a certain portion of this land. Later the tract was sold to the plaintiff's grantor, the defendant reserving "a right of way" (apparently the fee), but not mentioning the right to flood the adjoining land. *Held*, that there was an implied reservation of this right. *Fremont, etc., R. R. Co. v. Gayton*, 93 N. W. Rep. 163 (Neb.).

Where an owner has burdened one part of his land for the benefit of another part, and then sells the burdened part, most jurisdictions refuse to imply a reservation of an easement, though the burden was open and continuous. *Wheelton v. Burrows*, L. R. 12 Ch. D. 31; *Mitchell v. Siepel*, 53 Md. 251. The reason given for this, is that the grantor may not derogate from his grant. But this rule should, it would seem, be no more inflexible than the rule that the grantee may not claim rights not expressly included in his conveyance. Yet the courts allow a grantee of the *quasi* dominant part to claim an easement in the grantor's land by implied grant, on the ground that the parties have contracted with reference to the existing condition of the land. *New Ipswich Factory v. Batchelder*, 3 N. H. 190. It would seem that this is equally true, whichever part is sold, and that considerations which permit of implied grants should also permit of implied reservations. A few jurisdictions so hold. *Harwood v. Benton*, 32 Vt 722; *Seibert v. Levan*, 8 Pa. St. 383. The principal case strengthens the doctrine in the United States.

**PROPERTY — EMINENT DOMAIN — LAND ALREADY DEVOTED TO PUBLIC USE.** — *Held*, that a city holding its easement over park lands in trust for the public cannot have compensation when the park is taken for a post-office. *In re Certain Land in Lawrence*, 119 Fed. Rep. 453 (Dist. Ct., Mass.). See NOTES, p. 446.

**PROPERTY — PRESCRIPTION — DOCTRINE OF LOST GRANT.** — The plaintiff for twenty years used a right of way over the defendant's land. The defendant never prevented the use of the way, but often denied the plaintiff's right, and threatened to close up the way. *Held*, that the plaintiff gained no right of way by prescription. *Reed v. Garnett*, 43 S. E. Rep. 182 (Va.). See NOTES, p. 438.

**SALES — BILL OF LADING — LIABILITY OF INDORSEE FOR DEFAULT OF INDORSER.** — Action was brought by the plaintiffs for a breach of warranty of goods shipped to the plaintiffs under a bill of lading attached to a draft which the plaintiffs had paid to the defendant. The indorsements on the draft were sufficient to give the plaintiffs notice that the defendant held it for collection only. *Held*, that the defendant is not liable. *Gregory v. Sturgis Nat. Bank*, 71 S. W. Rep. 66 (Tex., Civ. App.).

The case is of interest as tending to limit the doctrine that the indorsee of a bill of lading takes subject to the liabilities of the assignor. See *Landa v. Lattin*, 19 Tex. Civ. App. 246. For a discussion of this doctrine see 16 HARV. L. REV. 292.

**SALES — CONDITIONAL SALE OF MARE — RIGHT OF SELLER TO OFFSPRING.** — The plaintiff was the holder of a recorded conditional bill of sale of a mare. He claimed the mare's colt from the defendant who had purchased the unweaned colt from the conditional vendee. *Held*, that the plaintiff is entitled to the colt. *Anderson v. Leverette*, 42 S. E. Rep. 1026 (Ga.). See NOTES, p. 442.

**STREET RAILWAYS — FRANCHISE DEPENDENT ON CONSENT OF ABUTTERS — PROCUREMENT BY PURCHASE.** — A statute provides that a municipal council shall not grant a franchise for a street railway "until there is produced to the council . . . the written consent of the owners of more than one half of the feet front" of the abutting land. Rev. St. Ohio, § 3439. A railway company purchased such consent from abut-

ters who would otherwise have withheld their consent. *Held*, that the condition imposed by the statute has been complied with. *Hamilton, etc., Traction Co. v. Parish*, 65 N. E. Rep. 1011 (Ohio).

The decision is of interest as involving the interpretation of a provision similar to those found in the statutes of other states and in the constitution of New York. See *Booth, St. Ry. Law* 23; N. Y. Const. Art. III. § 18. It cannot be supposed that the object of these enactments is to compel railway companies to compensate the abutters for damage suffered. Were that so, the statute would doubtless require the consent of all. The real purpose seems twofold. In the first place the municipal authorities are prevented from arbitrarily permitting the public streets to be used for railways. See *Roberts v. Easton*, 19 Ohio St. 78, 86. Secondly, the written consent of the majority in interest constitutes a petition to the authorities in whose discretion the granting of the franchise finally rests. If not purchased, this petition is strong evidence that the railway in question would substantially benefit the land owners most nearly affected and hence ordinarily the general public. See *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 32, 37. To allow purchase, on the other hand, plainly permits the abutters to impose unreasonable terms on the railway company. From these considerations it would seem that on principle the decision in the principal case is questionable. It is opposed, also, to the only authority found directly in point. *Doane v. Chicago City Ry. Co.*, *supra*; but see s. c. 51 Ill. App. 353. Further, under analogous statutory requirements concerning street improvements the consent of the necessary proportion of abutters cannot be purchased. *Maguire v. Smock*, 42 Ind. 1; see *Howard v. First Church*, 18 Md. 451, 456.

**SURETYSHIP — CO-SURETIES — RIGHTS IN SECURITY HELD BY CO-SURETY.** — A sheriff's bond was executed with several sureties. One of these refused to become bound unless security was given for his personal indemnification. Such security was accordingly given. There was no evidence that the other sureties knew of the transaction, but there was no actual fraud. It was claimed that the security must be held for the equal benefit of all the sureties. *Held*, that the surety who obtained it may use it for his own separate indemnity. *McDowell County Com'rs v. Nichols et al.*, 42 S. E. Rep. 938 (N. C.). See NOTES, p. 439.

**TORTS — LIABILITY FOR NEGLIGENT FAILURE TO PERFORM CONTRACT WITH THIRD PARTY.** — The defendants contracted with the lessor of the plaintiff to heat the building in which the plaintiff was a tenant in such a manner that a patent fire sprinkler would not freeze. The defendants negligently failed to do so, the fire sprinkler burst, and the plaintiff suffered damage. *Held*, that the defendants are liable in tort for the negligent failure to perform what they had undertaken. *Pittsfield Cottonwear Co. v. Pittsfield Shoe Co.*, 53 Atl. Rep. 807 (N. H.).

The court recognizes it as well established law that there can be no recovery, by the present plaintiff, on the contract. *Boston, etc., Trust Co. v. Salem Water Co.*, 94 Fed. Rep. 238. The case rests on the sole ground that the defendants, having assumed to prevent the accident, are liable for damages resulting from their negligent failure to do so. See *Edwards v. Lumb*, 69 N. H. 599. The contract is important only in so far as it shows the existence of an undertaking. The court fails to consider the important question as to whether the defendants were guilty of a misfeasance or of a nonfeasance, assuming apparently that there was a misfeasance. If a mere failure to act according to contract is a misfeasance, there is no meaning left for the word nonfeasance. The great weight of authority has been that there could be no recovery in tort unless there was a misfeasance. *Osborne v. Morgan*, 130 Mass 102; *Styles v. Long Co.*, 51 Atl. Rep. (N. J., Sup. Ct.) 710. There is a strong and growing tendency, however, to do away with what seems only an arbitrary distinction, and to allow recovery for damage from nonfeasance. *Lough v. Davis & Co.*, 70 Pac. Rep. 491 (Wash.); *Mayer v. Building Co.*, 104 Ala. 611. It is unfortunate that the principal case, in arriving at a desirable result, does not face the issue squarely. See 16 HARV. L. REV. 133.

**TORTS — LIBEL — NEGLIGENT PROTEST OF SATISFIED NOTE.** — The defendant, the holder of the plaintiff's note, agreed to send the note to the plaintiff for cancellation, and in consideration received a renewal note. He negligently caused the original note to be protested. *Held*, the plaintiff can recover in tort for the damage to his credit. *State Mut. Life, etc., Assn. v. Baldwin*, 43 S. E. Rep. 262 (Ga.).

The case appears unique on its facts since the protest was made negligently. Where an unwarranted protest was intentional, recovery for libel has been allowed. *May v. Jones*, 88 Ga. 308. The court in the principal case rested its decision on the ground that a tort is committed by the negligent violation of a contractual duty. Cf. *City, etc., Ry. Co. of Savannah v. Brauss*, 70 Ga. 368. But this view is unsupportable on prin-

ciple or authority, and moreover, the reasoning is inapplicable to the facts of the principal case, where the negligent protest of the note and not the violation of the agreement to deliver it for cancellation was the basis of the plaintiff's claim. A possible ground for recovery exists in the theory that liability should be attached to any negligent misstatement which causes damage. See 14 HARV. L. REV. 184. But this theory has not yet been accorded general recognition. The facts, however, though they negative actual malice, show a negligent misstatement which injures the plaintiff's credit, and this according to the better view is a sufficient basis for an action of libel. See *Shepherd v. Whitaker*, 32 L. T. 402. See also 15 HARV. L. REV. 757.

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## BOOKS AND PERIODICALS.

**LIABILITY OF CONQUERING NATION ON OBLIGATIONS OF CONQUERED.** — The responsibility of a conquering nation for the obligations of the vanquished state is ably discussed in a late article. *The Liabilities of a Conqueror*, by H. Erle Richards, 28 L. Mag. and Rev. 129 (Feb., 1903). The author recognizes that there is no generally accepted principle upon which to determine the extent of these liabilities. He argues that two theories founded on analogies from private law are each defective. One, that the conqueror simply takes possession of the conquered country in defiance of all pre-existing claims in much the same manner as a disseisor, he says is inadequate because it leaves out of account the rights of neutral powers; and the other, that the conqueror is a universal successor like an administrator, he rejects because it affords no way of avoiding responsibility on certain obligations which no conqueror can be expected to assume, such as the debt incurred by the conquered state in prosecuting the war resulting in its downfall.

Though the theory that the conqueror's rights and liabilities are merely those of a possessor has distinguished support (3 FILLMORE, INTERNAT. LAW, §§ 545-555), the author's criticism of it appears just. It does not seem to be doubted that a debt owed by a debtor outside the conquered territory can be recovered. See *U. S. v. McRae*, L. R. 8 Eq. 69. Yet this clearly cannot be explained on a theory based on possession only. The objection to the theory of universal succession, that there are some debts which no conqueror will assume, seems equally valid.

Mr. Richards proposes to determine the liabilities to be assumed by an application of the principle that prevails as to the assumption of treaty obligations. A successor is admittedly bound only by treaties having reference to the soil, such, for instance, as those concerning the navigation of rivers or the cession of territory, while treaties in their nature personal, such as treaties of commerce or alliance, are extinguished. Mr. Richards contends that the obligations owed to a neutral subject are as extensive as those owed to a neutral nation, but submits that they cannot in any event be more extensive. According to his view, the determining question would simply be whether a given obligation is attached to or charged on the assets taken over by the conqueror. Two objections to this theory may be offered. The first is that the analogy between a treaty and an obligation owed to a private person is not strong. A treaty is a contract between sovereign states, and affects each of the parties in its relation to the whole family of nations. If one considers the disturbance in political or commercial relations which would follow from attempting to combine the treaties of alliance or commerce of the conquered with those of the conquering nation, it is seen at once why such treaties cannot be assumed. Private obligations, on the other hand, might well be assumed without such a disturbing effect on foreign policy. The second objection is that the proposed test, which requires the obligation to be attached to the assets, would exclude a most important obligation which it is generally supposed ought to be assumed, namely, the gen-

eral debt of the conquered state existing previously to the war. The author, it is true, regards this general debt as "impliedly" attached to the assets. But it is hard to see why an obligation to pay money is in its nature any more attached to the assets than an obligation to permit X to trade, or to buy supplies from Y, and yet the author concedes that these would not be so attached. In private law, a debt is clearly not in general attached to the debtor's assets.

On the whole, it would seem a more satisfactory rule that the conquering state, since it takes possession of the assets of the vanquished state, should assume all its obligations toward private persons unless peculiar reasons for their repudiation exist in special cases. Such reasons would exist, as the author points out, with regard to the debt incurred by the conquered state in the war resulting in conquest, and with regard to certain liabilities peculiarly personal to the conquered state, such as a contract to buy army uniforms during a period of years, and other executory contracts which from their nature depend on the continued existence of the conquered state, and possibly a tort liability. To these exceptions might be added obligations likely to disturb the relations of the conqueror with other nations.

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**GIFT OVER OF REALTY UNDISPOSED OF AT DEATH OF FIRST TAKER.** — Chancellor Kent remarked in 1813 that "a valid executory devise of real or personal estate cannot be defeated at the will or pleasure of the first taker," — in other words, that an executory devise which may be defeated by the taker of the prior estate is invalid; and thereafter the law of real property in the United States was formulated with due regard to this doctrine. The facts of the case calling forth the proposition were these: A devise of realty was made to A and his heirs, but if A died without issue the "said property he should die possessed of" was to go over to X. Obviously by the clause quoted the power to dispose of the property in fee by deed and thus defeat the gift over was impliedly given to A, and the Chancellor accordingly declared that the executory devise to X was void. *Jackson v. Bull*, 10 John. (N. Y.) 19. Modern criticism has shown that the holding was not sustainable on its authorities, the principal case cited in support being a most ill-founded Massachusetts decision. *Id. v. Id.*, 5 Mass. 499; see GRAY, RESTR. ALIEN. § 68. On theoretical grounds, also, *Jackson v. Bull* has been subjected to severe adverse comment, an illustration of which appears in a recent article. *Effect of Power to Alienate on Executory Devise*, by B. M. Thompson, 1 Mich. L. Rev. 427 (Mar., 1903).

This article denies Kent's assertion that an executory devise is invalid if the prior taker has the power to defeat it, and adopts the following test: Is the contingency on which the executory devise is to take effect the "refusal or failure to exercise a power incident to the prior estate devised"? If so, the condition is said to be void and to render the executory devise ineffective. But the estate given to A under the limitation "to A and his heirs, but if A die without issue then over," is, the author says, a conditional fee, of which the power of alienation in fee is not an incident. Cf. 32 Am. L. Reg. N. S. 1045. In *Jackson v. Bull*, to be sure, such power of disposal was given to the tenant of the conditional fee, but this did not enlarge the conditional fee any more than the power of disposal given to a life-tenant enlarges the life-estate. Hence, says Mr. Thompson, when the gift over was made to comprise such of the property devised as A should die possessed of and was thus in effect limited on the failure to alienate, it was not limited on the failure to exercise a power incident to the prior estate devised, and therefore should have been held valid.

The author's reasoning is technical. The result reached thereby would differ from that of Chancellor Kent at most only in those cases where a conditional fee could be established. Suppose that an absolute fee were given to A with a limitation over to X of the property undisposed of at A's death. According to the author's view the executory devise to X would be bad, since it depends upon the non-exercise of the power of alienation, a power incident to the abso-

lute fee granted. Thus in a large class of cases where the influence of Chancellor Kent's decision is greatly to be deplored the author's view would furnish no relief. Yet in this class of cases no reason exists in the nature of things why the executory devise should not be upheld. The reason urged against an executory devise of undisposed of personalty, namely, that the limitation is too indefinite since it is generally impossible to determine the exact property so left, does not apply to devises of realty, which are here under consideration. Moreover, as was pointed out by counsel in early cases in England, if the limitation were to A for life, with power of appointment by deed or will, and in default of appointment over to X, the devise to X would be valid. See *Ross v. Ross*, 1 Jac. & W. 154, 156. This admittedly valid limitation, however, produces a result identical with that where the fee is given to A with an executory devise over to X of property undisposed of. If, then, there are any valid objections to the latter limitation, they cannot rest on grounds of policy and substantial justice. But the technical objection raised by Mr. Thompson seems equally unavailing. His basic proposition, as his authorities indicate, is but a special expression of the supposed objection of "repugnancy" or "incongruity," an objection which declares that no estate can be granted deprived of its ordinary incidents, but which has been characterized by one judge as "a notion which savors of metaphysical refinement rather than anything substantial." Truro, L. C., in *Watkins v. Williams*, 3 Macn. & G. 622, 629. Moreover, the recognized possibility of having a conditional fee, which *ex vi termini* is a fee with some of its ordinary incidents subtracted, is proof positive that no such general rule exists. An executory devise of realty undisposed of at the death of the taker of an absolute fee should accordingly be sustained, and the author's conclusion, in so far as it denies the validity of such a devise, seems incorrect.

Every effort should be made to sustain executory devises of realty undisposed of at the death of the first taker and thus effectuate the testator's intention. It is submitted that they should be upheld except in those cases where to allow them would impose an illegal restraint on alienation. When a tenant in fee is given full power of alienation both by deed and by will, with a gift over only on his failure to exercise that power, certainly no restraint on alienation exists and the executory devise should be upheld. GRAY, RESTR. ALIEN. §§ 57-74 g. In *Jackson v. Bull*, it is to be noted, alienation by will is restrained if A dies without issue. Possibly such a conditional restraint might be held to render the gift over inoperative. The actual decision in *Jackson v. Bull*, therefore, may be sustainable. See GRAY, RESTR. ALIEN. § 56 c. Chancellor Kent's *ratio decidendi* in that case, however, as Mr. Thompson well points out, is erroneous.

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STATUS OF CORPORATIONS ON DISSOLUTION OF CHARTERING GOVERNMENT. — The change of sovereignty in South Africa has given rise to an interesting question concerning the present status of corporations chartered by the old Transvaal government. Although the point is one that rarely arises owing to the fact that the contingency on which it depends is now of infrequent occurrence, it has grown with the wide extension of corporate interests to be one of no small importance. Direct authority on it is very meager, and hence a discussion of it in a late issue of an English magazine deserves remark. *The International Status of Modern Companies*, by D. F. Pennant, 28 L. Mag. and Rev. 161 (Feb., 1903). The author draws a distinction between municipal and private corporations, and concludes that the former, being mere subdivisions of the central government, cannot survive it, but that the latter are sufficiently independent of it to be unaffected by its dissolution. It is at once obvious that if all corporate charters were *ipso facto* annulled when the government which granted them ceases to exist, great confusion would result in business circles. In the interim between the death of the old and the proper organization of the



new government, corporate interests would be completely stagnated. Mr. Pennant's conclusion that private corporations continue to exist is, therefore, in keeping with sound business policy. It is also supported by what authority there is on the point. *Kansas Pac. R. R. Co. v. Atchison T. & S. F. R. R. Co.*, 112 U. S. 414; *Importing and Exp. Co. of Ga. v. Locke*, 50 Ala. 332. The ground of this view is that notwithstanding a change of sovereignty all the laws of a country continue as before until the new sovereign takes active steps to change them, — a principle well established in the law. *Commonwealth v. Chapman*, 13 Met. (Mass.) 68. The change is merely in the sovereign itself, while the entire legal system remains undisturbed. The new government simply assumes control of an already existing system. The old sovereignty has passed statutes and granted charters, and all of them are equally the laws and ordinances of that sovereignty, and should continue in effect until the new government sees fit to change them.

The above considerations should be equally conclusive of the status of municipal corporations. Mr. Pennant's premise that municipal corporations are commonly regarded as subdivisions of the central government cannot be disputed, but it would seem that his conclusion does not necessarily follow. Although the municipalities do exercise functions delegated to them by the old sovereign, those functions are of a purely local and non-political nature, entirely unconnected with national affairs. The sovereign in all nations having systems of local self-government remains in active control only of national and political affairs, and only those should be affected by a change of sovereignty. No decisions in point have been found, but it is a matter of history that municipal charters granted by one government have remained in effect under succeeding governments without re-enactment. For example, the city of New York was governed until 1830 under a charter that was granted in 1730. *NEW YORK CITY CHARTERS, KENT'S NOTES*, p. 71.

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**CASES ON CRIMINAL LAW.** A Selection of Reported Cases on Criminal Law. By William E. Mikell, Assistant Professor of Law in the University of Pennsylvania. Philadelphia: International Printing Co. In two volumes. Vol. I. 1902. pp. 504. 8vo.

The first volume of a new collection of cases on criminal law by William E. Mikell, Assistant Professor of Law in the University of Pennsylvania, intended primarily for use by the students in the University of Pennsylvania Law School, is well worth a careful examination by any one who is interested in the modern methods of teaching law. The book is divided into two parts on the principle which Mr. Bishop and other modern writers have found expedient, the present volume treating of the general elements of crime and the second volume now in preparation covering cases on specific crimes. In theory of treatment this collection of cases is not unlike the "Cases on Criminal Law" of Professor Beale. The introductory cases indicating the sources of criminal law, the chapters on the nature of the criminal act, on criminal intent, on criminal intent as affected by peculiar conditions, and on justification for crime, and finally the chapter on parties to crime, follow very closely the scheme of Professor Beale's book. The noticeable features distinguishing the present work are the more refined subdivision of the subject-matter, the tendency to introduce decisions in which the opinions are long and the arguments *pro* and *con* elaborately discussed, and finally the addition of a group of American cases decided since the publication of Mr. Beale's book.

This close subdivision of topics merits distinct approval. The placing of each case under a specific head suggests to the student the principle of law for which it is inserted, and enables the discussion of it in the class-room to be focused upon that principle. The book moreover is thus made far more serviceable to the practitioner, who usually desires to know the law upon a certain specific point and who can turn at once in Mr. Mikell's book to an apt illustra-



tion of the general doctrine upon that point and also find appended to it a footnote containing excellent examples of contrary or modified views adopted in other jurisdictions.

The introduction of long opinions seems much more valuable in a book that is to be used for private study than in one that is intended to be used for classroom discussion. The most satisfactory cases for use under the "case system" of teaching law are those short, terse decisions which contain a few essential facts and a brief statement by the court of its opinion, but which leave the student to determine the grounds of the court's action and the validity of its position. Decisions which contain elaborate arguments dissecting the varying doctrines upon a questionable point of law leave little opportunity for original thought by a class. At most a student can say only that the decision is right or that a certain objection is not answered convincingly. To the student who does not have the benefit of class discussion the well chosen elaborate opinion is, of course, valuable, as it presents to him just what the discussion by the class and the summary by the teacher ought to put before him.

The recent American cases included in the volume are happily chosen and illustrate effectively the present tendency of the American courts. Under this head one may refer in particular to the cases on criminal conspiracy. The wisdom of introducing the subject of conspiracy into a discussion of the elements of crime may well be doubted; for conspiracy is in fact a specific crime and should be taken up in the volume considering other specific crimes and should not be treated as if it were mere partial performance of a further criminal act like the attempt or solicitation to commit a criminal act. Yet if it be granted that the subject is treated in a suitable place the cases which are chosen from a legion of modern decisions are particularly appropriate.

The publishers are to be congratulated on the make-up of the book. The type is clear and large, and the broad margins give excellent opportunities for additional notes and citations by the student.

W. R. P.

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REPORT OF THE MASSACHUSETTS COMMITTEE ON CORPORATION LAWS,  
created by Acts of 1902, chapter 335. Boston : Wright & Potter Printing  
Co. 1903 pp. 306. 8vo.

Under the provisions of an act of the Massachusetts Legislature of 1902, a committee of three leading members of the bar was appointed to consider the laws of the state relating to the formation, taxation, and conduct of manufacturing and trading corporations. This act was the product of a growing conviction that the present laws have become unsuited to existing industrial and financial conditions. The committee has now completed its labors and submitted its report to the legislature.

The report contains a criticism of the existing statutes with reference to their theory and practical effect, a suggestion as to the true theory which should govern such legislation, and a draft of a Business Corporation Law, the adoption of which is recommended in place of the existing laws. The committee disapproves of many of the burdensome conditions now imposed on Massachusetts corporations, such as the restrictions on capitalization and the payment of stock and the requirements as to the liability of officers and stockholders, as arbitrary and unsuited to modern business methods. Freedom of organization and capitalization, freedom of self-regulation, and liberality towards foreign corporations, subject only to reasonable supervision and control, are regarded as the guiding principles. The subject of taxation is treated with especial thoroughness. The history of the legislation on this topic is clearly outlined, its burdensome or prohibitive effects on some classes of corporations are carefully analyzed, and its inadequacy under modern conditions is plainly established.

The act recommended by the committee is a conservative revision of present legislation, drawn on liberal lines. It does not change the machinery of the existing laws, yet it considerably increases corporate freedom along the lines

suggested by the committee's criticisms of the present laws. Nevertheless it still retains a wise amount of state supervision and insures a reasonable degree of publicity. Notable changes suggested are the removal of the limit on the amount of capitalization and the provisions for unpaid-up stock. The present system of taxation is so modified, especially in the method provided for the determination of the value of the franchise, that the excessive burdens which are now imposed on some classes of corporations are removed, but without freeing any corporation from a reasonable amount of taxation. The legislation proposed by the committee thus provides for a liberal scheme of corporate organization and existence without giving undue opportunity for looseness or mismanagement. It might well be adopted with little or no amendment. The appendix of the report contains a carefully prepared summary of the provisions of the corporation laws of all the states, relating both to general regulation and to taxation. Aside from its special interest in Massachusetts, the report is thus a valuable study of the whole subject of corporation legislation. It is an excellent piece of work.

W. H. H.

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A TREATISE ON THE POWER OF TAXATION, State and Federal, in the United States. By Frederick N. Judson. St. Louis: The F. H. Thomas Law Book Co. 1903. pp. xiii, 868. 8vo.

No branch of American constitutional law is more important or more interesting than that which treats of the power to tax. The importance of the subject for the lawyer is especially great at the present time. To-day, as never before, the attention of economists and legislators is engaged in the endeavor to devise adequate methods for distributing the burdens of taxation over the various forms of wealth existing under the complex conditions of our unsettled economic *régime*. As a result of this economic and legislative unrest new questions concerning taxation are constantly presented to lawyers and courts for solution. The subject is of great interest, also, to the general student of constitutional law, since many of the greatest constitutional principles have been developed and expounded in decisions of the United States Supreme Court involving in the first instance the power to tax. Notable examples of this are *McCulloch v. Maryland* and the recent Insular Decisions. It is therefore desirable that the principles of these decisions, which have been accumulating for over a century, should be systematically and adequately presented in a separate treatise. This task has been very satisfactorily accomplished by Mr. Judson. His work is to be commended as a serviceable contribution to the literature of constitutional law.

The scope of the author's undertaking is narrower than that of Cooley's standard treatise on taxation. The latter treats of the subject as governed by both the federal and the state constitutions, thus including all aspects of taxation, federal, state, and local. Mr. Judson, on the other hand, has confined himself to those questions only which arise under the Federal Constitution. The first sixteen chapters of his book treat of the restrictions upon the taxing power of the states,—those implied in the relation of the federal government to the states, and those that are imposed by express provisions, such as that which prohibits the impairment of the obligation of contracts and the Fourteenth Amendment. The next chapter discusses the taxing power of Congress under the grant of Article I, section 8, of the Federal Constitution, and the restraint of that power by the proviso as to direct taxation and the proviso concerning "articles exported from any state." The concluding chapter relates to matters of procedure. An appendix contains the Constitution of the United States and the most important provisions of the state constitutions relating to taxation.

The author's method of handling his subject is very effective. His citations are confined almost exclusively to decisions of the United States Supreme Court, decisions of the state courts and the inferior federal courts being referred to only as applying or illustrating the principles enunciated by the Supreme

Court. The discussions are clear and thorough. In connection with the more important decisions such as *McCulloch v. Maryland* and *Gibbons v. Ogden*, ample extracts from the opinions of the court have been inserted to state and explain the *rationes decidendi*; and, in general, the important dissenting opinions are given due attention.

In a few points of mechanical detail, however, the book seems open to adverse comment. A legal work should, by every aid, make clear to the busy lawyer exactly what it contains and where each item is to be found. At the very outset one is likely to be misled because the title of Mr. Judson's book is too comprehensive. It gives no hint that the subject treated is confined to the taxing power under the Federal Constitution. Further, some of the chapter titles seem inapt. To give a single instance, Chapter X. is entitled "The Fourteenth Amendment." One is surprised, therefore, to find that the six chapters following also deal with this amendment. Again, the author has failed to indicate in the table of contents the divisions and subdivisions into which the material of his book logically falls. Finally, it may be doubted whether he has in every instance arranged the material in the best order. Thus at the beginning of Chapter X. he says: "The restraints upon the state power of taxation discussed in the preceding [nine] chapters have been those growing out of the relation of the State to the Federal government." This would hardly seem to be true of Chapter II., which discusses the limitations imposed by the proviso against the impairment of the obligation of contracts.

MANUAL OF FRENCH LAW AND COMMERCIAL INFORMATION. By H. Cleveland Coxe. Paris and New York: Brentano's. London: Simpkin, Marshall, Hamilton, Kent, & Co. 1902. pp. viii, 292. 12mo.

This little work is precisely what its title suggests, a convenient handbook of French law and commercial usage. It compiles and classifies in small space a mass of miscellaneous practical information that should be of distinct value to those travelling or temporarily residing in France or having business connections there. A vast number of topics are handled, most of them presumably by Mr. Coxe himself, and several, as he states, by contributors who are experts in their respective fields. He also acknowledges his indebtedness to several consular officials, and to others in government or business positions whose sources of information are particularly reliable.

Though containing much that might be of suggestive value to lawyers, the book is ostensibly designed chiefly for the use of laymen. The mode of treatment is accordingly straightforward and clear, sometimes conversational, and always pleasingly free from needless technicality. One who is puzzled merely by some every-day question of French law or trade custom should here find its solution; one whose difficulty, however, is of a more serious character would probably here get little satisfaction.

Appended to the book and occupying thirty pages are various model forms for contracts, leases, notices, and other documents, all of them being inserted in the original French.

STATUTORY LAW OF CORPORATIONS IN PENNSYLVANIA, including Annotations and a Complete Set of Forms. By John F. Whitworth and Clarence B. Miller. Philadelphia: T. & J. W. Johnson & Co. 1902. pp. xi, 930. 8vo.

This is such a convenient compilation that, in looking through it, one wonders why such a work has not appeared before. The Pennsylvania Statutes collected in it have been enacted during a period of seventy years and are scattered throughout many volumes. They are here arranged in thirty-four chapters. The first chapter is devoted to the General Corporation Act of 1874, as

amended by subsequent enactments; seven others to acts relating to various important topics such as Sale of Franchises, Merger and Consolidation, Dissolution, and Foreign Corporations; and the remaining twenty-six to the laws governing as many different classes of corporations, — for example, Oil Companies, Mining Companies, and Street Railway Companies. In each chapter the acts included are printed in chronological order and form a continuous text, the paragraphs being headed by catch-phrases in heavy type. Ease of reference is further ensured by an exhaustive index covering fifty pages. A valuable feature of the work is a collection of forms prepared for use in complying with the various statutory requirements of Pennsylvania relating to corporations. The book is one which corporation lawyers of that state should find of value.

**PRACTICAL STATUTES**, being a Collection of Statutes of Practical Utility in Force in Ontario, with Notes on the Construction and Operation thereof. By James Bicknell and Arthur James Kappeler. Toronto: Goodwin & Co. 1900. pp. xlvii, 925. 8vo.

This volume comprises the British North America Act and such Canadian and Ontario statutes as are of greatest importance in Ontario law. At the end of each statute there are admirably concise annotations collecting the English and the Canadian decisions bearing upon its construction and application. Thus the book appears to be a very convenient work of reference for most matters arising under the statute law of the province. It should consequently prove of considerable value to the lawyer practising in Ontario, but, because of its local character, it would probably be of little service elsewhere. Inasmuch as a large proportion of the decisions rendered at the present day are concerned with statutory matters it is to be regretted that works of this kind are not more common.

**A TREATISE ON COMMERCIAL PAPER AND THE NEGOTIABLE INSTRUMENTS LAW**, including the Law relating to Promissory Notes, Bills of Exchange, Checks, Municipal Bonds, and other Negotiable and Non-negotiable Instruments, with an Appendix containing the Negotiable Instruments Law and the English Bills of Exchange Act. By James W. Eaton, Late Lecturer in the Albany Law School and in the Boston University Law School, and Frank B. Gilbert. Albany: Matthew Bender. 1903. pp. xciii, 767. 8vo.

**REPORT OF THE TWENTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION**, held at Saratoga Springs, New York, August 27, 28, and 29, 1902. Philadelphia: Dando Printing and Publishing Company. 1902. pp. 870. 8vo.

**A TREATISE ON THE LAW OF PRIVATE CORPORATIONS**. By Wm. L. Clark and Wm. L. Marshall. St. Paul: Keefe-Davidson Law Book Co. 1901. 3 vols. pp. xxxi, 1-828; xxviii, 829-1716; xxxii, 1717-3038. 8vo.

**THE LAW OF REAL PROPERTY and Other Interests in Land**. By Herbert Thorndike Tiffany. St. Paul: Keefe-Davidson Company. 1903. 2 vols. pp. xxxiii, 1-828; xv, 829-1589. 8vo.

**REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1900-1901**. Washington: Government Printing Office. 1902. 2 vols. pp. cxii, 1-1216; vii, 1217-2512. 8vo.

**DELAWARE CORPORATIONS**. Address by Josiah Marvel before the students of the Department of Finance and Economy of the University of Pennsylvania, May 14th, 1902. 1902. pp. 24.

**THE ENCYCLOPÆDIA OF EVIDENCE**. Edited by Edgar W. Camp. Vol. I. Los Angeles: L. D. Powell Company. 1902. pp. 1020. 8vo.

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## RESCISSION FOR BREACH OF WARRANTY.

A DISPUTED question in American law is whether a buyer who has purchased goods with a warranty may return the goods and rescind the sale if the warranty is broken. According to the English law, he may not,<sup>1</sup> but in Massachusetts from an early day it has been continuously held that such rescission is allowable.<sup>2</sup> The authorities in this country in recent times have been divided. Though the text-writers have not generally recognized the fact, nearly as many courts<sup>3</sup> have fol-

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<sup>1</sup> *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Dawson v. Collis*, 10 C. B. 523; Sale of Goods Act, Secs. 11 (1) (b), 53 (1), 62 (1). Before the decision of *Street v. Blay*, the English law was supposed to allow rescission; Lord Eldon had so ruled in *Curtis v. Hannay*, 3 Esp. 82.

<sup>2</sup> *Bradford v. Manly*, 13 Mass. 139; *Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 271, 273; *Bryant v. Isburgh*, 13 Gray 607; *Smith v. Hale*, 158 Mass. 178; *Gilmore v. Williams*, 162 Mass. 351, 352. At the outset the Massachusetts Court simply followed what was then regarded as the English law, but refused to change its ruling after the decision of *Street v. Blay*.

<sup>3</sup> ALABAMA. *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Thompson v. Harvey*, 86 Ala. 519; *Hodge v. Tufts*, 115 Ala. 366.

CALIFORNIA. *Polhemus v. Herman*, 45 Cal. 573; *Hoult v. Baldwin*, 67 Cal. 610 (*conf.* Cal. Civ. Code, § 1786).

IOWA. *Rogers v. Hanson*, 35 Ia. 283; *Upton Mfg. Co. v. Huiske*, 69 Ia. 557; *Eagle Iron Works v. Des Moines Ry. Co.*, 101 Ia. 289.

LOUISIANA. Code, Art. 2520; *Flash v. American Glucose Co.*, 38 La. Ann. 4 (based on the Civil Law).

KANSAS. *Craver v. Hornburg*, 26 Kan. 94; *Weybrich v. Harris*, 31 Kan. 92; *Gale Mfg. Co. v. Stark*, 45 Kan. 606.

lowed the Massachusetts rule as have followed the English law.<sup>1</sup>

It may aid in determining which opinion is supported by the better reason to remember that a warranty is simply a promise, and to analyze briefly the nature of the obligation.

In the early law in order to make out a warranty it seems to have been necessary to use the word "warranty," or at least some equivalent,<sup>2</sup> but now an express affirmation, whatever form it takes, is

MAINE. *Cutler v. Gilbreth*, 53 Me. 176; *Milliken v. Skillings*, 89 Me. 180. See also *Noble v. Bushwell*, 96 Me. 73.

MISSOURI. *Branson v. Turner*, 77 Mo. 489; *Johnson v. Whitman Works*, 20 Mo. App. 100; *Kerr v. Emerson*, 64 Mo. App. 159; *St. Louis Brewing Assoc. v. McEnroe*, 80 Mo. App. 429; *Edwards v. Noel*, 88 Mo. App. 434.

NEBRASKA. *Davis v. Hartlerode*, 37 Neb. 864. See also *McCormick Co. v. Knoll*, 57 Neb. 790.

NORTH DAKOTA. *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229 (*conf.* N. Dak. Civ. Code, § 3988).

OHIO. *Byers v. Chapin*, 28 Ohio St. 300.

WISCONSIN. *Boothby v. Scales*, 27 Wis. 626; *Croninger v. Paige*, 48 Wis. 229; *Warder v. Fisher*, 48 Wis. 338; *Minn. Threshing Co. v. Wolfram*, 96 Wis. 481; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Optenburg v. Skelton*, 109 Wis. 241, 244.

See also *Sparling v. Marks*, 86 Ill. 125; *Mader v. Jones*, 1 Russ. & Chesley (Nova Scotia) 82.

<sup>1</sup> UNITED STATES SUPREME COURT. *Thornton v. Wynn*, 12 Wheat. 183; *Lyon v. Bertram*, 20 How. 149.

CONNECTICUT. *Trumbull v. O'Hara*, 71 Conn. 172; *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554.

GEORGIA. *Woodruff v. Graddy*, 91 Ga. 333; Ga. Code, § 3556.

ILLINOIS. *Crabtree v. Kile*, 21 Ill. 180; *Owens v. Sturges*, 67 Ill. 366; *Kemp v. Freeman*, 42 Ill. App. 500 (but see *contra* *Sparling v. Marks*, 86 Ill. 125).

INDIANA. *Marsh v. Low*, 55 Ind. 271; *Hoover v. Sidener*, 98 Ind. 290; *Wulschner v. Ward*, 115 Ind. 219, 222.

KENTUCKY. *Lightburn v. Cooper*, 1 Dana, 273.

MICHIGAN. *H. W. Williams Transportation Line v. Darius Cole Transportation Co.*, 88 N. W. Rep. 473.

MINNESOTA. *Merrick v. Wiltse*, 3 Minn. 41; *Lynch v. Curfman*, 65 Minn. 170 (*conf.* *Close v. Crossland*, 47 Minn. 500).

NEW YORK. *Voorhees v. Earl*, 2 Hill 288; *Cary v. Greeman*, 4 Hill 625; *Muller v. Eno*, 14 N. Y. 597; *Day v. Pool*, 52 N. Y. 416; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269.

PENNSYLVANIA. *Kase v. John*, 10 Watts 107; *Freyman v. Knecht*, 78 Pa. 141; *Eshleman v. Lightner*, 169 Pa. 46.

SOUTH CAROLINA. *Kauffman Milling Co. v. Stuckey*, 40 S. C. 110.

SOUTH DAKOTA. *Hull v. Caldwell*, 3 S. Dak. 451.

TENNESSEE. *Allen v. Anderson*, 3 Humph. 581.

TEXAS. *Wright v. Davenport*, 44 Tex. 164.

VERMONT. *Hoadly v. House*, 32 Vt. 179; *Matteson v. Holt*, 45 Vt. 336.

ONTARIO. *Mooers v. Gooderham*, 14 Ont. 451.

<sup>2</sup> See 2 HARV. L. REV. 9.



generally held to amount to a warranty.<sup>1</sup> It is ordinarily said that a warranty is a collateral promise, and the same condition has been applied, not very happily, to a promise which forms in terms part of the description of the goods. In the time of *Chandelor v. Lopus*<sup>2</sup> it is probably true that a warranty was necessarily collateral. But under the present English law it is not true that a warranty is in form always collateral. When A agrees to sell B a horse and adds "I warrant him sound," the warranty is collateral in form. When, however, A contracts to sell B a sound horse, there is no collateral promise, yet if A delivers to B an unsound horse and B takes title to him, A is a warrantor of the horse's soundness, with precisely the same consequences as in the first case.<sup>3</sup> Further, suppose that specific goods are sold under a description. A buyer asks for "strap-leaf red top turnip seed,"<sup>4</sup> or "large Bristol cabbage seed,"<sup>5</sup> or "rape seed,"<sup>6</sup> or bulbs of a named variety.<sup>7</sup> No agreement to sell precedes the actual sale, but when the seller furnishes goods he is held to warrant that the goods are of the kind asked for. Yet the description can hardly be called collateral in form. On the other hand, in case of an executory contract, even though A puts his promise in a clearly collateral form, B may presumably reject the horse in precisely the same way as if the promise of soundness had been part of the description.<sup>8</sup> It is thus immaterial whether the promise is

<sup>1</sup> Mechem on Sales, § 1235.

<sup>2</sup> Croke, James, 4.

<sup>3</sup> Sale of Goods Act, sec. 11 (1) (a). See too Mechem on Sales, § 1334, n. 1, § 1393. This is not law in New York and some other states. Mechem, § 1392.

<sup>4</sup> Wolcott v. Mount, 30 N. J. Law 262.

<sup>5</sup> White v. Miller, 71 N. Y. 118.

<sup>6</sup> Hoffman v. Dixon, 105 Wis. 315.

<sup>7</sup> Edgar v. Breck, 172 Mass. 581. There was in this case an agreement to sell before the completed sale. See further Mechem, § 1334. These are American cases, but the English law is presumably the same. See Allan v. Lake, 18 Q. B. 560. Compare, however, Varley v. Whipp, [1900] 1 Q. B. 513.

<sup>8</sup> This is not expressly so provided in the Sale of Goods Act; and perhaps the contrary is implied. In Dawson v. Collis, 10 C. B. 523, also the court criticised a statement in Smith's Leading Cases that the buyer might refuse to receive the goods. The right of the buyer to refuse the goods, however, is still asserted in Smith's Leading Cases (10th Eng. Ed.) 26. In this country the buyer would probably be allowed to refuse the goods even by courts which do not allow rescission for breach of warranty, in the case of an executed sale. Mechem on Sales, § 1802, n. 5. Sec. 11 (1) (b) of the Sale of Goods Act provides that "a stipulation may be a condition, though called a warranty in the contract." This provision would doubtless enable a court to hold the buyer justified in refusing the goods. Certainly it seems incredible if a dealer said "I will sell you a piano which I will select for you and which I will warrant per

collateral or not, and the distinction taken between conditions and warranties has probably caused more confusion than assistance. The essential thing under the English law is whether the contract is executed or executory. If it is executed, the buyer must seek redress in an action or counterclaim for damages, or in recoupment when sued for the price; if executory, the buyer may accept the goods, retaining his claim for damages, or he may reject the goods. Doubtless it is true that in the case of an executed sale the promise will generally be collateral in form, while in the case of an executory sale it will generally form part of the description of the goods. But neither of these propositions is invariably true. A may agree to sell goods next week, warranted sound, and he may transfer title to-day to goods ordered by description.

This statement of the English law will also serve as a statement of the law of warranty of most of the states in this country which do not allow rescission for breach of warranty. New York, however, has a long series of decisions developing a distinction between conditions and warranties which do or do not survive acceptance. Under the New York law it is clear that generally, if the promise of kind or quality forms part of the description of the goods and the buyer accepts the goods, he has lost all rights under the promise, while if the promise is collateral in form, the buyer has not only the right to reject and then sue for damages, but also the right to accept the goods and nevertheless sue for damages. The distinction between so-called conditions and warranties has in New York, therefore, a real importance. Whether this distinction exactly corresponds with the distinction commonly taken between conditions and warranties, or whether there are not cases where the obligation of a promise which forms part of the description of the goods will survive acceptance of the goods and cases where the obligation of a promise collateral in form will not survive acceptance, it is unnecessary to inquire here, and the question may be left to the determination of local specialists.<sup>1</sup> The decisions of the New York court have had some influence on the decisions of other states, but the weight of authority clearly favors

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fect in every respect" and a buyer accepted the offer, that the dealer could hold the buyer bound to accept an imperfect piano and rely on an action for damages. If such is the English law, that circumstance may detract somewhat from the effect of the criticism of this article upon the propriety of different names for warranties and for descriptive words. The criticism of the English law, however, apart from its nomenclature, will gain added force from so shocking a result.

<sup>1</sup> See an article by Professor Burdick, in 1 *Columbia Law Review*, 71.

the English rule, that acceptance of the goods does not bar an action for damages because the goods are not of the agreed kind or quality, whether the seller's promise was collateral in form or was part of the description of the goods.<sup>1</sup>

The objections and the advantages of allowing rescission for breach of warranty may be considered under two headings, theoretical and practical.

The theoretical objections to the remedy are, that rescission is not allowable in the case of an executed contract in any event, and, further, that as a warranty is collateral to the main transaction, breach of the warranty cannot affect the validity or finality of the transfer of title. The two transactions, it is said, are in their nature separate and distinct. The objection that rescission should not be allowed for breach of a promise in any executed contract, finds support undoubtedly in the early law of England, and indeed in the law of England to-day; but the same cannot be said of the law in this country, and in a discussion of correct legal principle it is not unworthy of remark that the law on the Continent of Europe generally allows rescission in such cases. Aside from the possible conflict with the law as it actually exists, there is no intrinsic objection to allowing rescission and restitution on account of breach of any essential promise, if the parties can be put in *statu quo* or substantially so. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price? These are the essential inquiries, and there can be little doubt of the answers. Nor is the state of the law such that allowance of the remedy in question would violate fixed principles or analogies. On the contrary, it would follow the tendency of the law. It is a striking fact that both in the Civil law and in the Common law rescission has been increasingly allowed during the past century as a remedy for breach of contract.

Both the Roman law and the English law began by denying the remedy altogether in the case of both executory and executed

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<sup>1</sup> Mechem, § 1392 *seq.*

contracts. By a gradual process, as law has become more ethical, under both systems the remedy has been extended.<sup>1</sup> The most apposite illustration is furnished by the rules applied where the buyer, instead of the seller, makes default in the performance of his obligations, after title has passed. This case is the converse of breach of warranty. The seller is generally allowed in this country, if he still retains possession of the goods to rescind the sale and keep the goods as his own, or to dispose of them to another buyer, if the original buyer proves insolvent or otherwise makes default in the obligations of the contract of sale. The seller is given similar rights where goods are stopped *in transitu*. This right of rescission on the part of the seller does not seem to exist in England, and has been somewhat criticised by text writers, but it appears to be uniformly law in this country.<sup>2</sup> It can hardly be doubted that the American rule is justified by business convenience. If a buyer purchases goods and the title passes, but the price is unpaid and the seller retains possession, is it just to the seller to require him to hold the goods forever for the buyer's benefit? This result, though a logical consequence of the English law before the Sale of Goods Act,<sup>3</sup> is not reached anywhere. The seller may certainly resell the goods.<sup>4</sup> This may be called not a rescission but a foreclosure of the lien. Suppose, however, that the seller realizes more by the resale than by the original sale. May the buyer claim the surplus? Would it be thought fair in a mercantile community that a buyer should after default get the benefit of such a chance? Those who drew the Indian Contract Act thought not,<sup>5</sup> and in this country it can hardly be questioned that the buyer would not get the surplus.<sup>6</sup> In England the result would be more doubtful.<sup>7</sup> If the buyer cannot get the surplus, the result is explicable only on the theory that the seller has the power to rescind the sale. Suppose, further, that the seller does not make a resale,

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<sup>1</sup> See 14 HARV. L. REV. 317 *seq.*; Moyle, Contract of Sale in the Civil Law, 190; 13 HARV. L. REV. 85, 86, 94-97.

<sup>2</sup> See Mechem, §§ 1681, 1682; Burdick on Sales, p. 243.

<sup>3</sup> *Martindale v. Smith*, 1 Q. B. 389; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. at p. 145, *per* Lord Chelmsford.

<sup>4</sup> Sale of Goods Act, Sec. 48 (3).

<sup>5</sup> Indian Contract Act, Sec. 107. "The buyer must bear any loss," but he "is not entitled to any profit which may occur on such resale."

<sup>6</sup> See Mechem, §§ 1681, 1682; Burdick, p. 243.

<sup>7</sup> See *Ogg v. Shuter*, L. R. 10 C. P. 159, 1 C. P. D. 47; *Mirabita v. The Imperial Ottoman Bank*, 3 Ex. D. 164.

but on the buyer's default keeps the goods himself and uses them. Has he converted the buyer's property? If the buyer made default would not any merchant be likely simply to put the goods back into his stock? May the buyer come in at any time and claim them if they appreciate in value? Such a rule would be both inconvenient and unjust.<sup>1</sup>

It may be urged, however, that even if we grant that rescission is a proper remedy for breach of contract and even of an executed contract, it should not be allowed in the case of breach of warranty, because a warranty is a collateral obligation. As has already been shown, a warranty in the English law is not always collateral in form. A promise which forms part of the description becomes a warranty when title passes. Still it is doubtless true that the typical warranty is collateral. Thus, a seller may sue for the price of a horse which he has sold and warranted sound without alleging in his declaration anything about the warranty.<sup>2</sup> From this the inference may be drawn, that the price of the horse is promised in return for the transfer of title, and that the warranty is a collateral promise of which the consideration is not the price but the sale. This is doubtless the form the transaction takes, but the collateral character of the warranty is only formal. After reflection, no one can doubt that in such a bargain the inducement for the payment or promise to pay the price is in part, and in an essential part, the giving of the warranty. The form which the transaction takes justifies the court in applying the rules of pleading and procedure applicable to collateral stipulations and conditions subsequent; that is, the plaintiff need allege nothing about the matter,

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<sup>1</sup> The analogy between the case suggested and that of a sale or mortgage of real estate may seem troublesome at first sight. A court of equity allows the buyer or mortgagor to fulfil his contract after long delay, only requiring payment of interest on the delayed purchase money or debt. But the seller or mortgagee has his remedy. At any time he may foreclose the rights of the party in default by filing a bill for specific performance or for foreclosure. Bills for specific performance or foreclosure are not allowed to enforce bargains for the sale of ordinary goods, and the machinery of equity which works justice in the case of contracts for land is too slow and expensive to be a desirable, if it were a possible, remedy for any and every sale of goods. Mercantile convenience demands a short cut, and the effect of the American rule is to enable the injured seller himself to assume the functions of a court of equity and foreclose the rights of the buyer if he is substantially in default. However, the seller acts at his peril. The buyer must be in such default as to justify the seller's action. Instead of throwing the responsibility on a court of equity he must assume it himself, and he may have his choice of a strict foreclosure, whereby he regains title to the goods, or of a foreclosure by sale.

<sup>2</sup> *Parker v. Palmer*, 4 B. & Ald. 387.

and the burden is on the defendant to allege and prove the existence of the collateral stipulation. To go farther than this, however, is to confuse matters of form with matters of substance. The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. In early times, the court said that what one party to a bilateral contract bargained for was the obligation of the other, and that if he got that obligation he could not complain because the obligation was not performed. This is unquestionably sound argument, if the form of the transaction is to govern; but since the time of Lord Mansfield, courts have no longer been willing to dispose of the matter on so technical a ground. It is apparent that the real thing bargained for was the performance, and that the obligation was merely a means to that end. Consequently, with limitations that need not now be considered, courts have allowed the defendant to refuse to perform, because the plaintiff had refused or failed to perform on his part. Similarly, in the case under discussion, it is obvious that when a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it, which is in his mind. He does not want an unsound horse, worth half the money, and the difference in damages. He wants to be perfectly sure that he is getting a sound horse, and if the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make, as is any defendant, if compelled to perform his part of a contract when the plaintiff is materially in default.

When the question is considered from the standpoint of practical applications, the advantages of the Massachusetts rule are manifest. The advantages are twofold: first, greater justice; second, the avoidance of the necessity of determining certain very troublesome questions of fact in order to settle a buyer's rights. The facts in the recent case of *Varley v. Whipp*<sup>1</sup> illustrate to some extent both advantages. The defendant agreed to purchase a specific second-hand reaping-machine which was in the seller's possession in another town. The seller assured the buyer that the machine was new and had been used to cut over only about fifty acres. By the bargain the machine was to be delivered on the cars at the seller's residence. The statements made about the machine were

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<sup>1</sup> [1900] 1 Q. B. 513.



not true and the defendant rejected it. The court held that he was justified in so doing. This result is certainly to be commended. Any rule which would compel the buyer to take the machine and an action for damages would do violence to the usages and expectations of ordinary business men under such circumstances. Yet it may be doubted if the court in order to protect the defendant and yet maintain its theory of warranties did not find itself obliged to confuse important distinctions. The Sale of Goods Act provides (section 13) that "where there is a sale of goods by description there is an implied condition that the goods shall correspond with the description." Channell, J., said:

"The term sale of goods by description must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. . . . If a man says that he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year-old horse in the last stall, and there is a horse in the last stall but it is not four years old. But if he says he will sell a four-year-old horse, and there is a four-year-old horse in the stall, and he says that the horse is sound, this last statement would be only a collateral warranty."

Yet this was certainly a sale of specific goods, or, as the Act defines that term, "goods identified and agreed upon at the time a contract of sale is made." The parties were speaking of a particular machine, and the machine put on the cars was the machine in regard to which the parties were dealing. It did not possess all the qualities the seller asserted, but to say it was not the machine the parties were talking about is to confuse the attributes of the thing sold with the thing itself. In short, it is hard to see why the title to the machine did not pass not later than when it was put on the cars according to the contract. The facts may be varied slightly. Suppose the buyer had casually seen the machine a week before, when he was not thinking of purchasing, and the seller agreed to sell the buyer "that machine you saw," inducing the sale by false statements in regard to the machine. It would be as harsh as in the actual case to make the buyer keep the machine, yet surely there the court could not say that the sale was by description, or that there was a failure to identify the thing sold.

Even if the reasoning of the decision be supported, it is evident that the English court will have to take very nice distinctions in order to determine when there is a sale with warranty, and

when the sale fails because the goods do not comply with the description. If the contract is to sell a sound four-year-old horse in the last stall, title will not pass apparently, but if the contract is to sell a four-year-old horse which the buyer says is sound, there is a sale with a collateral warranty. In view of the careless way that oral bargains and even written bargains are worded, it is evident that the questions will be very difficult, and the answers bear little relation to the intention of the parties, for the parties mean the same thing whichever way they happen to express themselves.

It is at all times a troublesome question in the law of sales to determine when title passes and when it does not—so troublesome that often nothing but litigation can determine it. If the distinctions taken in *Varley v. Whipp* are sound, the difficulty is increased. For some purposes it is necessary to decide whether title has passed, difficult as the question may be, but it is certainly a clear, practical advantage if, in a given situation, the same rule is applicable whether title has passed or not. Under the Massachusetts rule not only are the fine-spun distinctions between conditions and warranties unimportant, but in this connection it makes little difference whether title has passed.<sup>1</sup> If the seller has promised in any form that the goods possess some quality and they do not, the buyer may refuse to take the goods if he has not already taken them, and may return them if he has previously received them. He may refuse to pay the price if he has not already paid, and if he has paid it he may recover it. The simplicity of the rule is perhaps its greatest merit.

If a sale is induced by fraudulent statements, rescission is admittedly proper.<sup>2</sup> And if a seller knows of the falsity of the statements he makes which constitute a warranty, he is fraudulent. The morality of taking advantage afterwards of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale. It is a difficult question of fact, and one which arises in very many cases of broken warranty, how far the seller knew that his warranty was

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<sup>1</sup> There seems to be one difference. If title has not passed and goods are offered which do not comply with the seller's agreement, the buyer may not only reject the goods, but may sue the seller for damages. If title has actually passed, though the buyer may at his option reject the goods, or keep them and sue for damages, the authorities do not seem to allow him both rights. If he rescinds the sale, he cannot recover damages.

<sup>2</sup> See *Mechem*, § 932 and cases cited.

false. It is clear gain if this question also becomes immaterial, as it does in Massachusetts and other states allowing rescission for breach of warranty.

The English rule represents in truth a partial survivorship of the principle of *caveat emptor*. This remnant of the doctrine may well be swept away, as the more obviously barbarous applications of the doctrine have already been.

*Samuel Williston.*

## GOVERNMENT OWNERSHIP OF PUBLIC UTILITIES

FROM THE STANDPOINT OF CONSTITUTIONAL LIMITATIONS.

**I**N the great and widespread industrial warfare which is being waged in this country, no one occurrence has brought so forcibly to the attention of the people at large the portentous significance of this strife to the whole nation as has the great strike in the anthracite coal regions of Pennsylvania. The close observer and intelligent student of public affairs ought not to be surprised to observe, as one of the more remote consequences of this strike, an increase of the receptivity of the public mind to the principles of thoroughgoing socialism. To my mind, this tendency of thoughtful minds to subscribe to and indorse socialism is one of the serious dangers to our present civil polity, which, as is well known, is based upon the principles of individualism.

If we were living in an European country, there would be no occasion for the penning of this paper, for I am not a political economist, nor do I propose to present here an economic argument for or against the government ownership of public utilities. But American constitutional law imposes upon the courts of this country the imperative duty to declare legislation to be unconstitutional and void which contravenes some provision of the constitutions, national and state. And it is a matter of common information that the courts are not loath to pronounce their veto upon legislation which restricts personal liberty or interferes unconstitutionally with the continued possession and enjoyment of vested rights. It seems to me, for these reasons, that the constitutional aspect of the proposition for the government ownership of public utilities, and the distinction which the political economists make between that proposition and the principles of socialism, may be a timely subject for the consideration of students of jurisprudence. This is the purpose and subject of this paper.

If a business or occupation is absolutely and inherently harmful to society, or fraudulent in character, it matters not how or by whom it is carried on, the only possible effective police regulation is the total prohibition of such trade or business. But it may

happen that a trade or business is inimical to the public welfare only when it is left open to all who may choose to follow it; and that the menace to the interests of the commonwealth may be eliminated by the prohibition of such trade or business to individuals, and the grant to a few of the exclusive right to carry on the trade or business as a statutory monopoly. The adjudications have made it very plain that such a monopoly cannot be created out of an ordinary trade or business without violating the constitutional right of every man who desires to engage in it. Every man has a right, under reasonable regulations, to pursue any one of the ordinary callings of life as long as his pursuit of them does not involve evil or danger to society. A law which granted to one man, or to a few men, the exclusive privilege of prosecuting such a trade or business would be a clear violation of the constitutional rights of those who had been thereby prohibited from engaging in the same business or occupation.<sup>1</sup> When, however, the state bestows upon one or more persons the exclusive privilege of engaging in a business which but for this grant of the privilege was not open to any one because it is not possible without governmental aid for any one to conduct it, whatever other constitutional objection may be raised to such a grant of a monopoly, it is not objectionable because it has violated anybody's right to engage in the trade or business; for the trade or business never existed before the grant of the monopoly, and, with the repeal of the statute which created it, would disappear all right to carry it on.

In order that a railroad or bridge may be constructed, or a gas or water plant be established, by private individuals, the government must grant to the parties who purpose its construction a franchise or privilege which is not enjoyed by individuals in general, and which is not procurable in any other way than by express legislation. In the case of the bridge or railroad the privilege or franchise is the right of eminent domain, whereby the railroad or bridge company may appropriate to its own use, upon payment of compensation, the lands of private owners which may be needed for the construction of the projected railroad or bridge. It is possible that the land which may be needed for a bridge might be procurable in ordinary cases by voluntary purchase; but this is hardly possible in the case of a railroad. And, even when

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<sup>1</sup> This is so elemental a proposition of constitutional law that I have not considered it necessary in this connection to cite authorities. I may, however, refer the reader for them to my "State and Federal Control of Persons and Property."

such an unusual event occurs as that a railroad acquires its entire road-bed by purchase, the possession of the right of eminent domain exercises a powerful influence in its efforts to secure the necessary land by voluntary purchase. Furthermore, in the establishment of a bridge or ferry over and across a navigable stream, the consent of the government to this extraordinary use of the stream must first be obtained. This in itself is a franchise, not enjoyable except by special grant.

Prior to the present century the government has exercised this right of eminent domain by condemnation for direct governmental purposes only. The limitation of the right of eminent domain — that it cannot be exercised in order to transfer one man's land to another, even upon payment of full value — has in days gone by led to the construction that to make it a *public use*, to which the condemned lands were to be applied, there must be a direct or immediate use, as for public parks, buildings and highways, levees on the river bank, and aqueducts, drains, and sewers, all of which are the direct property of the state. But in the present century changes in the economic conditions, inventions like the steam-engine, and advances in the science of engineering, all have combined to demand facilities for transportation and locomotion from place to place, which could alone be provided by the construction and maintenance of railroads, street railways, and numerous bridges. This new economic demand arose at a time when the *laissez-faire* philosophy was in complete ascendancy, when the popular mind would have been startled by the proposition that the government should embark in the business of railroading. At the same time the people demanded the facilities which the railroad would afford. The railroad could not be constructed without condemning sufficient private land between the two termini of the projected road to enable the construction of a continuous roadbed. But would not the taking of these lands by the railroad, with the consent of the state, be a taking of one man's land and giving it to others, the incorporators of the railroad? The legal profession came to the rescue, and suggested that "public use" must be interpreted, in determining the limitations of the right of eminent domain, as meaning "public good" or "public purpose"; and the railroad was declared to be a quasi-public corporation.<sup>1</sup> The

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<sup>1</sup> See *Fisher v. Manufacturing Company*, 12 Pick. 67; *People v. Township Board of Salem*, 20 Mich. 452; and especially the opinion of Chancellor Walworth in *Beekman v. Schenectady, etc., R. R. Co.*, 3 Paige 45, 73, 22 Am. Dec. 679.



conclusion reached was that, since the railroad was a quasi-public corporation, whose business would promote the public welfare by furnishing better means for transportation of goods and passengers, land which was confiscated for railroad purposes in the exercise of the assigned right of eminent domain was devoted to a public purpose, and not to a private use. This development of the law of eminent domain, leading to the general assignment of the right of eminent domain to all private corporations which, like the railroad or bridge companies, are designed to satisfy some public want, is directly traceable to the universal aversion to having the government engage in such affairs which was prevalent when railroads were first constructed, and which is still felt by the majority of our people. If, however, the popular conceptions of the general relation of the state to industrial affairs had been then as they are now with a strong minority of our people, it is very likely that the legal obstacles to the grant to private corporations of the right of eminent domain would have led to the building of railroads and bridges by the government.

If the established rule is open to constitutional objection, it will not be on the ground that it violates the right of the individual to build and construct a railroad or bridge, to construct and conduct railways in the streets and highways, to lay down conduits, pipes, and wires in the streets and highways for the transportation from place to place of water, gas, electric light, and oil. In all of these cases no one has a right to do any of these things without a special grant of the privilege.

It has been held in some early cases, that an exclusive grant to a company to furnish a city with gas is unlawful and void, because it is the creation of a monopoly.<sup>1</sup> The Connecticut court, in rendering this judgment, rested its decision on the ground that "the business of manufacturing and selling gas is an ordinary business, like the manufacturing of leather or any other article of trade, in respect to which the government has no exclusive prerogative"; completely ignoring the fact that the gas could not be distributed to consumers unless continuous beds for the pipes were secured, either by the extraordinary use of the public streets, or by the appropriation of private lands in the exercise of the delegated right of eminent domain. Judicial opinion throughout this country has advanced very far beyond this position of the court in

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<sup>1</sup> *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

the case just cited, and it is now the accepted principle of constitutional law that the grant of such an exclusive franchise is a constitutional exercise of governmental power.<sup>1</sup>

Although, because of the argumentative character of this paper, no attempt has been made to give a full citation of authorities in support of the proposition advanced, I feel assured the reader who is conversant with the constitutional limitations of American governments will readily concede the soundness of these two propositions: *First*, if a business cannot be conducted by any one except under and with the aid of a grant by the government of some special privilege or franchise, the government may make of that business a more or less exclusive monopoly without violating anybody's natural right to carry it on. *Secondly*, if a business can be successfully conducted by a natural person or private corporation without government aid in the nature of a grant of a special franchise or privilege, there can be no prohibition of carrying on the business unless it is of such a nature that, if left open to individual enterprise, injury to the public cannot be avoided. If it be of such a nature, the business may be prohibited to the average person, and be converted into a more or less exclusive monopoly without unduly restricting the personal liberty of the citizen.

In this discussion of the right to create monopolies, the constitutionality of their creation has so far been chiefly considered from the standpoint of the individuals who have been prohibited by law from the prosecution of a lawful and ordinary calling or business because it has been converted by statute into a more or less exclusive monopoly and granted as such to a few persons or corporations.

But there is another and a very important standpoint from which we should consider the creation of these statutory monopolies. Does not the grant of exclusive or monopolistic privileges to a few persons or private corporations, even in the apparently necessary and justifiable cases which I have just described, conflict with our constitutional declarations of the equality of all men before the law, and with the constitutional guaranty to all of equal privileges and immunities? Is it a sufficient answer to such a question to say that public interests forbid that any and every

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<sup>1</sup> See, by way of illustration, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Long Island Water Supply Co. v. City of Brooklyn*, 166 U. S. 685.

person who has the required capital should be permitted to construct a railroad, a street railway, a gas, electric light, water, telegraph, or telephone plant; that, on the other hand, these conveniences are public necessities, and that there is no alternative but to make more or less exclusive monopolies of them? Granted that individual capitalists cannot be allowed indiscriminately and without restraint to exercise the right of eminent domain, and to tear up the streets of a city in order to lay down conduits, pipes, and tracks; it does not necessarily follow that the right to do these things should be granted as a private monopoly to a few persons or corporations. If there was no other alternative to the creation of such private monopolies but the denial of these conveniences and necessities to the people, the law of overruling necessity would amply justify this patent and unmistakable violation of our constitutional guaranty of equal privileges and immunities. But there is another and a very feasible alternative. It is this: whatever business or industry cannot be left open to the free choice of all persons without favor or discrimination — subject only to reasonable regulations for the protection of the public and of individuals against fraud and other wrongs and dangers — should and can be made a government monopoly, instead of being granted to private individuals or corporations. A government monopoly certainly does not violate either the individual's right to carry on such a business, or the constitutional guaranties of equality and of equal privileges and immunities. And I shall attempt subsequently to show that there is no other constitutional objection to government monopolies in the cases indicated.

The courts have, in their adjudications, gone very far beyond the legal and political conceptions which prevailed in the early years of the nineteenth century, and which led prominent statesmen and jurists to speak contemptuously of the general declarations of the inalienability of certain personal rights which appear in all of our constitutions, national and state, as "glittering generalities."

Treatises upon constitutional law,<sup>1</sup> in the discussion of the constitutionality of regulations of the contractual relation of employer and employee, of the statutory prohibition or regulation of trade combinations, both capitalistic and labor, contain an invariable

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<sup>1</sup> It is probably permissible in this connection to refer to my own "State and Federal Control of Persons and Property."

appeal to the fundamental principles of American constitutional law: that all men are born free and equal; that no man shall enjoy privileges, which are not open to the equal enjoyment of all. The courts have, with very few and apparently justifiable exceptions, denied the right of the government to interfere with the contractual relations of employer and employee, because such an interference would be a curtailment of the personal liberty of the parties to the contract; and this policy of non-interference is justified by an appeal to the individualistic principle that the best interests of mankind are promoted by compelling every man, the strong and the weak alike, to rely upon his own resources, unaided by the artificial aid or support of the government. So, likewise, in sustaining the constitutionality of statutes which prohibit trade combinations and virtual monopolies, the innumerable industrial trusts and monopolistic trade corporations of the present day, the Supreme Court of the United States extols the idea of preserving from extinction the small tradesman, artisan, and manufacturer, and the consequent limitation of the concentration of large wealth into the hands of a few.<sup>1</sup> But can this judicial and legislative attitude be reconciled with the grant to private individuals and corporations of valuable franchises by which they are enabled to accumulate vast fortunes in supplying the necessities of the people? Does the grant to private capitalists of a street-railway franchise differ in constitutional principle from the conversion of the street or highway itself into a turnpike road which the people can use only upon the payment of a toll?

It is certainly a case of judicial inconsistency to deny to the legislature the right to interfere with the liberty of contract of the individual for the purpose of regulating the price of wages and goods, and at the same time to increase the natural power of control which the capitalist, by the mere possession of his capital, already has over the rest of his fellow-citizens, by granting to him a privilege or franchise to supply a common and universal necessity. In this connection I am reminded of the couplet from Goethe's *Faust*, illustrative of the chief cause of the French Revolution:

"Ich kann mich trefflich mit der Polizei  
Doch mit dem Blutbann schlecht mich abzufinden."<sup>2</sup>

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<sup>1</sup> See the opinion of Mr. Justice Peckham in the *Trans-Missouri Freight Association* case, 166 U. S. 290.

<sup>2</sup> Roughly translated, the couplet may read: "I can accommodate myself excellently with the police (police regulations), but badly with the hereditary monopoly (Blutbann)."

The hereditary monopoly (Blutbann) of the eighteenth century does not, except as to subjects, differ materially from the statutory monopolies of the nineteenth century, in the minds of those who are yearning after the unattainable equality of all men. A substantial equality cannot be established among men by law; but the government can at least abstain from increasing the natural inequalities of life by giving to the already stronger the complete control of the avenues of communication and locomotion which every one is obliged to employ. There is only one way whereby the seeming equality of all men may be established in these conspicuous cases of governmental favoritism to the stronger; and that is, the conversion of all of these necessary monopolies from private into government monopolies.

Arguments to prove that, under the governmental regulation of rates and fares, the people get from these private statutory monopolies the necessary service, in the aggregate, at less cost to themselves than if they were government monopolies, are absolutely unavailing, even if they were believed to be true, against the sentiment that this economic advantage has been gained by a conspicuous sacrifice of the democratic principle of equality before the law.

The advocate of private franchises, however, may say: It does not come legitimately within the sphere of government to assume the administration of a business like that of a railway, a telephone or telegraph company. But that, at best, is a dogmatic assertion, unless it can be shown that there is an insuperable obstacle in the positive law of the country to government monopolies. It will not be sufficient to point to the experience of the past one hundred years, as proof of the claim that it is not one of the functions of the government to engage in such enterprises. In all parts of the civilized world, to-day and for the past century, the transportation of the mails has been a government monopoly. The highways in most cases are owned and maintained by the governments for the use and convenience of the people; while the railroads, the telegraph and telephone lines, in Europe and Australia, are for the most part in the hands of the government. In this country the waterworks are almost invariably the property of the cities which are supplied by them; while the number of cities and towns which own and conduct their electric and gaslight plants is rapidly on the increase. The bridges which span the rivers in contiguity to cities have been built and are

owned by these cities; while for years the cities of New York and Brooklyn have maintained and run the cable cars on the Brooklyn Bridge. Some years ago the people of the old New York City, now the Boroughs of Manhattan and Bronx of the present New York City, voted overwhelmingly in favor of the construction, ownership, and management by the municipal government of an underground rapid-transit railway.

But the opponent of government monopolies may inquire still further: If the government can rightfully and constitutionally engage in these, which have been heretofore considered private enterprises, what hindrance is there to the universal adoption in this country of socialism? If it is a legitimate function of government to manufacture and sell gas and electric light, to transport passengers and goods from one point to another, why is it not an equally legitimate function of government to manufacture and sell cloth and sugar, kerosene oil and iron and coal; to cultivate the fields and grow the various foods which are needed for the people's sustenance; to raise cattle and to prepare meat for consumption and to sell the same? Attention is drawn to the fact that in many of the countries of Europe the preparation and manufacture of tobacco and cigars have been for many years a government monopoly. And the fear is expressed and most seriously felt by a large proportion of those who give thought to these matters, that the nationalization of railroads and the municipalization of street railways, water works, gas and electric light plants, and the like industries, will lead inevitably to the general adoption of the principles of socialism.

If there were nothing in our constitutional law which might serve as a check upon the growth and extension of socialistic ideas and demands but the settlement of the vague query what are and what are not legitimate functions of government, we would be in the same condition of helplessness before a socialistic legislature as would be the people of Europe. But I submit that the courts of the country, and particularly the Supreme Court of the United States, would not find it difficult to draw a line, on fundamental constitutional principles, beyond which the state and municipal governments could not go in the absorption of what have heretofore been private enterprises. The courts have already drawn that line, as I have indicated, namely, that only those businesses can constitutionally be converted into government or other monopolies which cannot be left open to private competition without endangering the public welfare in some way.



As long as the judicial attitude has not been changed from its present opposition to unreasonable interferences with the liberty of contract, and its delimitation of the trades and occupations which can and cannot be prohibited to individuals, there is no reasonable ground for fearing that the city and state governments will be permitted to engage in the truly private business of trade and manufacture. The liberty to pursue any lawful calling, subject only to the reasonable police regulations which may be needed to protect the public and individuals against injury and fraud, is too well grounded in our constitutional law and in the every-day thought of the people to justify us in entertaining any serious or reasonable fear of socialism for generations to come.

The questions of political economy and practical politics which crowd one's mind and jostle each other at the thought of government monopolies, — growing out of the corruption of politics, the popular distrust in the honesty and efficiency of public officials, and the more or less general fear that through dishonesty or recklessness these government monopolies might prove costly experiments — deserve the most serious consideration, although the purpose of this paper will preclude an extensive discussion of them in this connection. Our experience with the postal service for a century, and the experience of the cities which have owned and conducted their water works and gas and electric light plants, seem to me in the main to stamp those fears of government ownership of these franchises as without serious foundation. It is well in this connection to bear in mind, as Mr. Bryce in his "American Commonwealth" has so forcefully pointed out, that the corruption and inefficiency which are so common in American politics would not be tolerated by the American people if they did not feel that in their constitutional limitations on the powers of the government, they had sure safeguards against any serious injury to their substantial interests which they might otherwise anticipate from the low state of their politics. When the substantial interests of the community are threatened by the corruption or inefficiency of officials, — as they would surely be if the government owned and conducted all of these statutory monopolies, — the same class of officials will no longer be tolerated.

It must also be borne in mind that under such a policy our financial giants would no longer be absorbed in the management of railroads, electric light, gas, telegraph and telephone companies, as private corporations, but their services would be sought and

required for the successful administration of these large government monopolies. Inasmuch as they would be deeply interested in their success as holders of the bonds which the government would have to issue to them in payment for the property which they would expropriate in the condemnation of the existing statutory monopolies, and for the extension and enlargement of them, public life and public office would then have an attraction for such men which they do not now have. They, the real rulers of the country to-day, as they would be under the new regime, would make very short work of the too often vulgar and corrupt men who are permitted, by the indifference of the substantial men of the country, to occupy the inferior and subordinate offices of the government.

Fifty years or more ago, the principles of individualism exerted over the political and legal thought of the country so powerful and widespread an influence that if it had then been proposed that a city government should assume the monopoly of supplying its inhabitants with gas or water, the judicial veto of such legislation would have been both decisive and general, on the ground that the government of the municipal corporation was only a local branch of the state government, and that it was not one of the functions of the government, either national, state, or municipal, to engage in the private business of vending water or light to private consumers. But the popular demand for the embarkation of municipal corporations in these enterprises of general utility became irresistible; and in numerous cases the creation of municipal monopolies of the character described has been declared to be a constitutional exercise of legislative power. What the legislature of a state may authorize a city government to do, in the establishment, as municipal monopolies, of water works, gas and electric light plants, street railways, etc., without violating any constitutional limitation or transcending the legitimate functions of government, the state or national governments may do likewise within their respective jurisdictions, in the absence of express constitutional limitations.

While, as has been already indicated, municipal monopolies have become rather common, and their existence and maintenance have accustomed the public mind to this somewhat radical departure from former conceptions of the proper functions of government, in only two cases have state or national governments in this country established state monopolies, as distinguished from

municipal monopolies, which have stood the test of an appeal to constitutional limitations. These are the postal department of the general government, and the liquor monopoly which has in recent years been established in South Carolina under the so-called dispensary law. There are, in addition to these, a number of canals which are owned and operated by state governments, and a treaty has just been ratified by the Senate of the United States, which provides for the acquisition and management by the United States of a ship canal across the Isthmus of Panama, and the incidental ownership or control of the Panama Railroad.

The right of the national government to establish the post-office and to provide for the transmission of the mail as an exclusive government monopoly could not in any event have been questioned, for the Constitution of the United States contains an express authorization of such a national monopoly; but, apart from this express authorization, the universality of this government monopoly would have probably been considered by the United States courts a complete answer to any constitutional objection which might have been raised, in accordance with the constitutional rule of construction which the United States Supreme Court adopted in the legal-tender case of *Juillard v. Greenman*.<sup>1</sup> In this case the court held that the national government may exercise any power which was commonly recognized by the civilized world as a function of government. The governments of Europe have very generally assumed the ownership and management of railroads and telegraph and telephone plants. And it would seem that this principle of constitutional construction could be more confidently relied upon to justify government ownership of railroads and other common means of intercommunication, than it would appear to have been in the case in which it was first enunciated.

But while this has not as yet become a practical question in this country, although I confidently believe it will be before the present century has waxed very old, we are not left altogether to conjecture what the answer of the Supreme Court of the United States would be to the constitutional objection to an act of Congress providing for the establishment of the railroads and telegraph lines as government monopolies. For some years ago that court declared<sup>2</sup> that the

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<sup>1</sup> 110 U. S. 421.

<sup>2</sup> *Pensacola, etc., R. R. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

power was implied, in the grant by the national constitution of the power to establish post-roads, to make government monopolies of the railroad and the telegraph, and to appropriate to its use the existing lines, in the exercise of the right of eminent domain. This was, of course, only a *dictum*, but it may be taken as a very reliable indication of what the decision of that court will be, whenever the direct question is brought before it for final determination.<sup>1</sup>

But, independently of this construction of the express grant of power to the national government to establish post-roads, I feel confident that the courts would not find it either unreasonable or fantastical to hold that ownership of public utilities is an implied power of the government; implied from the fact that in no other way can the public needs be satisfied, without the violation of the fundamental principles of American constitutional law which are involved in the constitutional guaranties of equal privileges and immunities, and of equality before the law. I can see no escape from the conclusion that these constitutional guaranties are most signally violated when the governments, national and state, grant to private capitalists the complete control of all of the means of intercourse and intercommunication between the people, even though the attempt is made to minimize the economic effect of this government policy by the regulation of these quasi-public corporations through the instrumentality of national and state commissions.

Two points in constitutional law bearing upon the subject of my thesis, I have endeavored to establish: *first*, that the grant of any more or less exclusive or special franchise to a private corporation or individual is a violation of the constitutional guaranty of equal privileges and immunities; and, *secondly*, that there is no constitutional prohibition of the establishment as government monopolies of any business or enterprise which private capitalists cannot undertake without the legislative grant of such a special or exclusive franchise.

The principle of constitutional law which I have advocated in this paper need not be confined in its application to the indispensable arteries of the social organism, such as railroads, bridges, tunnels, the telegraph and telephone, etc. The principle seems to me to be applicable to the governmental control of any of the natural

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<sup>1</sup> A similar *dictum* is to be found in *State of California v. Central Pac. R. R. Co.*, 127 U. S. 1.

deposits of the earth, such as coal and iron, or the forests. If the legislature of Pennsylvania, in obedience to an overwhelming popular demand, were to provide for the confiscation of the coal mines in that state, in the exercise of the right of eminent domain, and the control and management of them as government property, the courts would not very likely interpose any constitutional objection. This, of course, is a rather academic application of the principle for which I have been contending. In all human probability coal, iron, and other mines will continue indefinitely to be the private property of individuals. For the mine-owners have learned from their recent struggle with the mine-workers' union that they are not omnipotent; and they will be more willing in the future to come to terms with their adversary.

This leads me to the concluding thought in advocacy of government ownership of public utilities. The railroads, telegraph lines, and other means of communication and transportation must be continuous and reliable in their operation, in order that they may prove efficient in the satisfaction of the growing demands of civilized life. Any interruption of their operation by the disputes of the private companies which control them with their employees over wages and terms of hiring, resulting in a strike, interferes with the orderly prosecution of business in a way that the strike in a strictly private business cannot do beyond that particular business. Whatever serious doubts may be entertained concerning the political propriety of such government monopolies, in these days of labor agitation and gigantic railroad and telegraph combinations, when a strike of railroad and telegraph employees may extend over the whole country, stop the wheels of commerce, and produce a widespread commercial paralysis as long as the strike continues, public opinion may not, after a thoughtful consideration of this constant menace to the public welfare, reject the proposition to convert the railroads and telegraph lines into government monopolies.

It is true that, under the theory which was incorporated into our law by the decision in the case of *Munn v. Illinois*<sup>1</sup> and in the Granger cases — that railroads and telegraphs are businesses which are affected with a public interest, and therefore they may be subjected to whatever reasonable regulations may be apparently necessary to promote the public welfare — government intervention for the settlement of strikes and labor disputes between these corporations and their employees would doubtless be justified.

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<sup>1</sup> 94 U. S. 136.

Nevertheless, this practical suggestion seems to be pertinent, that, while compulsory arbitration under such circumstances would successfully suppress a strike after it had been ordered by the labor leaders, the facility which that procedure would afford for the constant redress of labor grievances, real and imaginary, would tend to increase rather than to diminish the number of strikes, although they may by such procedure be limited to the initial stages, and their duration curtailed. Furthermore, under such a regime, the government officials who would be charged with the settlement of these labor controversies would become the real managers of the corps of employees, without being made responsible for the successful management of the business. It is an axiomatic truth that any business is exposed to serious danger when power is separated from responsibility. The only consistent and safe policy, if the government is to interfere so actively and extensively in the management of the railroads and telegraphs as this plan of compulsory arbitration would involve, is the conversion of the railroads and telegraphs into government monopolies, so that power and responsibility shall not be divided or separated.

Again, if these important and indispensable agencies of commerce were government monopolies, all of their employees would become, as they are on the continent of Europe, and as the postal clerks are in this country and elsewhere, government employees. Strikes of government employees very rarely occur; and, so far as I know, the United States postal authorities have never had to contend with a strike of their clerks and other employees. Apart from the fear of the power of the government to force them to submission, which undoubtedly would in a measure restrain them from striking, even when the provocation was great, government employees are more readily satisfied with the same wage and the same terms of service. The socialistic antipathy which is now so prevalent to the appropriation by private capitalists of any of the profits of labor, as labor agitators estimate and describe them, and which is so powerful a lever for the creation of discontent in the case of private employment, would then be absent, inasmuch as the profits of the business of railroads, telegraphs, electric and gas-light plants, etc., would then be taken by the government for the benefit of the whole people.

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## CRIMINAL ATTEMPTS.

**A**N attempt to commit any crime, treason, felony, or misdemeanor, is itself criminal, though the attempt fails.<sup>1</sup> The attempt is not criminal *per se*, that is, the act of attempt is not in itself harmful to the state. The crime is a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary. It has, nevertheless, the qualities and characteristics of other crimes. It consists of a criminal act done with criminal intent, and the act includes not merely a physical act, but also a specific intent.

As in the case of other crimes, one cannot be punished for a criminal attempt unless at the time of committing the offense he had the guilty mind, the *mens rea*; but this requirement usually causes no difficulty, for the intent to commit the crime attempted will, save in an exceptional case, amount to a guilty mind. In addition to the general requirement of *mens rea*, the crime of attempt also necessarily involves a specific intent, the intent to accomplish the crime attempted. One cannot attempt or try<sup>2</sup> to do an act without the intent to do the act. The specific intent

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<sup>1</sup> Anon., Russ. & Ry. 107; R. v. Butler, 6 C. & P. 368; R. v. Roderick, 7 C. & P. 795; P. v. Burns, 69 Pac. Rep. 16 (Cal.); *In re* Lloyd, 51 Kan. 501, 33 Pac. Rep. 307; S. v. Jackson, 73 Me. 91, 40 Am. Rep. 342; C. v. Tolman, 149 Mass. 229, 21 N. E. Rep. 377; Smith v. C., 54 Pa. St. 209 (*semble*); C. v. Jones, 22 Pitts. Leg. J. 55; S. v. Maner, 2 Hill (S.C.) 453; Nicholson v. S., 9 Baxt. 258; C. v. Chapman, 1 Va. Cas. 138.

In Tennessee this appears to be confined to attempts to commit felonies: Whitesides v. S., 11 Lea 474.

In jurisdictions where "the common law of crime has been abolished," *i. e.* where nothing is an offense unless made so by statute, an attempt to commit a certain crime may not be criminal because of the failure of any statute to declare it so. *In re* Guayde, 112 Fed. Rep. 415; Kinningham v. S., 120 Ind. 322. See the peculiar doctrine of Wisconsin: S. v. Goodrich, 84 Wis. 359, 54 N. W. Rep. 577; S. v. Lewis, 113 Wis. 391, 89 N. W. Rep. 143.

It may be doubted whether this general statement is not a little too broad. An attempt to commit a mere simple assault without battery would probably be regarded as of too slight consequence for punishment. This is certainly true where assault is defined by statute as an attempt to commit a battery (Wilson v. S., 53 Ga. 205; White v. S. 22 Tex. 608), since an attempt to attempt is not a crime. Wilson v. S., 53 Ga. 205; Patrick v. P., 132 Ill. 529, 24 N. E. Rep. 619; S. v. Sales, 2 Nev. 268; S. v. Baller, 26 W. Va. 90, 53 Am. Rep. 66.

<sup>2</sup> These terms are synonymous. Lewis v. S., 35 Ala. 380; Bordeaux v. Davis, 58 Ala. 611.

to accomplish the crime alleged to have been attempted must therefore be alleged and proved,<sup>1</sup> and drunkenness may be shown to disprove the existence of such intent.<sup>2</sup>

An attempt involves, of course, more than a mere intention; it involves doing a criminal act.<sup>3</sup> And this act of attempt must be described in the indictment;<sup>4</sup> "attempted to commit the crime of murder" is not a sufficient description of crime. It is however usually held (often in accordance with a statute, but sometimes apparently at common law) that one may be convicted of an attempt upon an indictment for the substantive offense attempted; thus punishing for an act not described in the indictment.<sup>5</sup>

In order to constitute an act of attempt, the act must possess four characteristics: first, it must be a step toward a punishable offense; second, it must be apparently (but not necessarily in reality) adapted to the purpose intended; third, it must come dangerously near to success; fourth, it must not succeed. Each of these requirements must be examined with some attention.

### I. AN ATTEMPT IS A STEP TOWARD A CRIME.

An attempt may be described as an act regarded as a step toward another act. Most acts are done with a view to bring about a considerable chain of consequences; for instance, one who puts poison in the cup of another has several intents. He intends that the other shall take the cup into his hand, that he shall drink the poison, that the poison shall take effect upon the tissues of his body, that he shall leave his property by will to the wrongdoer. Each of these things may properly be described as the intent with which the actor put the poison into the cup. Each of these results may be taken by the law as an important fact having certain legal consequences; and as to each fact of this sort we may regard the act of putting poison into the cup as an attempt to do it, that is, as a step toward the completion of the ultimate fact selected, further from accomplishment as the fact

<sup>1</sup> *Scott v. P.*, 141 Ill. 195, 30 N. E. Rep. 329.

<sup>2</sup> *R. v. Doody*, 6 Cox C. C. 463.

<sup>3</sup> *S. v. Marshall*, 14 Ala. 410; *Kelly v. C.*, 1 Grant Cas. 484.

<sup>4</sup> *Thompson v. P.*, 96 Ill. 158; *C. v. Peaslee*, 177 Mass. 267, 59 N. E. Rep. 55; *S. v. Colvin*, 90 N. C. 717; *Randolph v. C.*, 6 S. & R. 398; *C. v. Clark*, 6 Gratt. 675.

<sup>5</sup> *R. v. Hapgood*, L. R. 1 C. C. 221; *P. v. Lowen*, 109 Cal. 381, 42 Pac. Rep. 32; *S. v. Shepard*, 7 Conn. 54; *S. v. Atherton*, 50 Ia. 189, 32 Am. Rep. 134; *P. v. Webb*, 127 Mich. 29, 86 N. W. Rep. 406; *S. v. Frank*, 103 Mo. 120, 15 S. W. Rep. 330; *S. v. Archer*, 54 N. H. 465.

selected is further on in the chain of consequences. Now if any fact in this chain is regarded by the law as a criminal offense, the act of putting the poison into the cup may be regarded as an attempt to commit such offense; the later consequences intended then become entirely unimportant, and the consequences earlier than the criminal one are of importance only as showing the intended connection between the act done and the consequence selected by the law as criminal. In investigating criminal attempt, therefore, we are to consider, first, what was the intended result which is regarded by the law as a criminal act; and secondly, what has the defendant done as a step toward bringing about that result. All other intents than the one to do the act in question then become unimportant; and the acts actually done are regarded as so many steps toward the accomplishment of the act intended to be done.

To illustrate, let us suppose in the example already suggested that the intended victim of the poison had at the time the poison was put in the cup been dead. Could the poisoner be indicted for a criminal attempt to kill? In such a case the criminal act of killing would be bringing the poison into harmful contact with the tissues of a living body. The poisoner took a step toward bringing the poison into contact with the tissues of what was in fact a dead body. Such a thing is not criminal. The act toward which he proceeded was not the contact of the poison with a living body, but the contact of the poison with the dead body. He intended also, to be sure, that the victim should die from the poison; but the point in the chain of results selected by the law as the criminal act is the contact of the poison with the tissues of the body. The physical harm, not the death of the victim, is the criminal act; the death, being subsequent, is, as we have seen, an immaterial factor in considering the attempt to commit the crime.

It is quite true that in the ordinary use of language a man attempts to bring about results as well as to do acts; that when a murderer in intention fires a pistol he is attempting not only to put a bullet into the object aimed at, but to cause the death of his intended victim, who may be a hundred miles away. But attempt in that sense, having a mere mental connection with the intended result, is not the concern of the criminal law, which punishes physical acts only. The important question is, what is the physical act which the defendant has set out to do; for to bring about

a harmless physical result in the vain hope of effecting a crime is not criminal. An attempt which is to form the subject of a criminal inquiry must therefore be a step toward a forbidden physical act. If the entire physical act which the accused has at this time set out to perform might be accomplished without committing a substantive crime, the attempt, not being an actual step toward a criminal act, cannot be criminal.

It must be confessed that this doctrine has not always been recognized. The earlier cases spoke of punishment for attempt as if it were a punishment of the criminal intent whenever evidenced by an act, even though the act was in itself harmless. The same idea, not uncommonly held even now, was well expressed by Jervis, C. J., in *Regina v. Roberts*:<sup>1</sup> "The guilt consists in the intent evidenced by the overt act." The same idea influenced the wording of a statute which is common in this country: "Whoever attempts to commit an offense prohibited by law and in such attempt does any act towards the commission of such offense . . . shall be punished." But in spite of these opinions, the law regards attempt, like any crime, as an act punishable in itself, and not merely as the proof of a criminal intent.

If then the physical act intended is not a crime, the attempt to do it cannot be criminal.<sup>2</sup> This principle may be made clearer by a few illustrations. The defendant wishing to kill an enemy shoots toward an imperfectly seen object which he believes to be his enemy. The object proves to be an animal or a stump. Whether the bullet misses its mark or hits it, the act is not criminal, for the thing which the actor aims to do is to bring his bullet into violent contact with the object seen. If he does so, he commits no crime; if he attempts to do so, he equally commits no crime.<sup>3</sup> It is immaterial that his ultimate purpose is to have his enemy die. The criminal act of homicide by shooting is the act of contact with the body shot. If the act of contact with the body shot is not an act of homicide, there is no crime in the attempt, and the desired ultimate result of the contact is immaterial. On the other hand, suppose the body aimed at had in fact been the actor's enemy, but for protection he wore armor capable of stopping a pistol bullet. Whether the actor's bullet goes astray or is stopped by the armor, he has equally failed to bring about that intended contact with the

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<sup>1</sup> Dears. 539, 25 L. J. M. C. 17.

<sup>2</sup> *Marley v. S.*, 58 N. J. L. 207, 33 Atl. Rep. 208.

<sup>3</sup> *R. v. McPherson*, Dears. & B. 197, 201, *per* Bramwell, B.

body at which he shot which the law selects as the criminal act. If the contact had been brought about, the act would have been one of criminal homicide or at least of battery; having failed, the actor has made a criminal attempt.

In a California case it appeared that the occupant of a house heard a step of a policeman on the roof and believed he saw the policeman looking down through a hole in the roof, and he thereupon shot toward the hole. The policeman was in fact upon another part of the roof and was unharmed. Whether he was guilty of an attempt to kill must depend upon the question, what in fact was the contact into which he purposed to bring the bullet he fired? If he intended to bring his bullet into contact with a policeman supposed to be behind the hole in the roof, his act if carried to the intended physical contact would have been criminal, and he was accordingly guilty of an attempt to kill.<sup>1</sup> If, on the other hand, he took the hole with the light shining through it for a human eye, and shot to put his bullet into the supposed eye, since the supposed eye was only a lighted hole, the intended contact was not criminal and he was not guilty of a criminal attempt.

In another case the defendant, an American soldier, desired to desert to the enemy; and seeing a body of troops which he took to be the enemy, he started toward them, but was stopped before reaching them. The troops were in fact American troops. He intended to walk in a certain direction for a certain distance, to join certain troops which he saw, and thereby to become a soldier of the enemy. His starting was an attempt to do each of these things. The only act in the series which was alleged in the indictment as criminal was the act of joining the troops he saw; but since the troops were American troops the act would not be criminal, and he was therefore guilty of no criminal attempt.<sup>2</sup>

Other illustrations of the same principle are not wanting. So where abortion before the child quickens is not criminal, an attempt to commit abortion at such a period is not criminal,<sup>3</sup> and so an offer to bribe a councilman to vote for one for an office which has ceased to exist is not a crime, since it could not be criminal for the councilman, from whatever motive, to vote for the person in question for the office.<sup>4</sup>

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<sup>1</sup> It was so held. *P. v. Lee Kong*, 95 Cal. 666, 30 Pac. Rep. 800; *acc. S. v. Mitchell*, 71 S. W. Rep. 175 (Mo.).

<sup>2</sup> *Resp. v. Malin*, 1 Dall, 33.

<sup>3</sup> *S. v. Cooper*, 2 Zab. 52.

<sup>4</sup> *C. v. Reese*, 16 Ky. L. Rep. 493, 29 S. W. Rep. 352.

## II. ADAPTATION OF MEANS TO RESULT.

An attempt cannot be criminal unless there is at least some apparent adaptation of means to result. If nothing is done which could by any possibility result in the desired end, the public cannot be harmed even in tendency, and the act cannot be criminal. "If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offense within such a statute. The poverty of language compels one to say, 'an attempt to kill by way of witchcraft,' but such an attempt is really no attempt at all to kill.<sup>1</sup> It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief."<sup>2</sup>

In accordance with this doctrine it has been held that throwing gunpowder against a house (gunpowder not exploding by mere contact) is not an attempt to injure by an explosive;<sup>3</sup> that striking with a small stick is not an attempt to kill;<sup>4</sup> and that mixing cantharides in the coffee of an intended victim is not an attempt to rape,<sup>5</sup> since the drug has no tendency to overcome the will.

But though the means must be apparently adapted to the end, it is not necessary that the end should in fact be possible of accomplishment by the means chosen. Every attempt to be punishable must be a failure, and must in fact have been doomed to failure from the moment the doer acted. It is absolutely impossible to kill a man with a bullet if the man is wearing bullet proof armor; it is equally impossible to kill him if the bullet is so aimed as to pass a hundredth of an inch beside him; but in both cases an attempt may be made to kill him. It is impossible for a pick-pocket to steal a watch from a pocket which has no watch in it; it is equally impossible to steal a watch which is attached to the person of the wearer by a chain which cannot be broken; and again, it is equally impossible to steal by a hand so large or so

<sup>1</sup> This seems hardly accurate. There is really an attempt, but one of such slight importance that the criminal law need not notice it.

<sup>2</sup> POLLOCK, C. B., in *Atty. Genl. v. Sillem*, 2 H. & C. 431, 525.

<sup>3</sup> *R. v. Sheppard*, 11 Cox C. C. 302. Though the offense is not quite that stated, but a statutory one, it would seem that the *ratio decidendi* is the same.

<sup>4</sup> *Kunkle v. S.*, 32 Ind. 220.

<sup>5</sup> *S. v. Lung*, 21 Nev. 209, 28 Pac. Rep. 235.



clumsy that the wearer of the watch will feel it. In all these cases it is possible to try to steal the watch. "To allow him immunity on the ground that this part of his expectation was ill grounded would be as unreasonable as to let a culprit off because he was not warranted in thinking that his pistol was pointed at the man he tried to shoot."<sup>1</sup>

In accordance with this general doctrine, it has been held that the crime of attempting to extort money may be committed though the victim (being in communication with the authorities) did not fear the threats;<sup>2</sup> of attempting to obtain by false pretenses though the pretenses were not believed;<sup>3</sup> of attempting to bribe or to influence the action of a public officer, though the officer had no legal power to bring about the desired result.<sup>4</sup> So a solicitation to leave the state in order to enlist is criminal, though the person solicited would not be accepted as a soldier;<sup>5</sup> and a cutting with intent to kill may be committed, though the wound given is not calculated to cause death.<sup>6</sup>

This question has been much considered in prosecutions for attempting to pick an empty pocket. In an early English case it was held that such an act could not be an attempt to commit larceny, since the act intended was impossible of performance.<sup>7</sup> This case, however, has been overruled,<sup>8</sup> and it is now settled law in England that an attempt may be criminal though accomplishment was impossible in the nature of things.<sup>9</sup> In this country such

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<sup>1</sup> HOLMES, J., in *C. v. Kennedy*, 170 Mass. 18, 21, 48 N. E. Rep. 770. See also *S. v. Mitchell*, 71 S. W. Rep. 175 (Mo.).

<sup>2</sup> *P. v. Gardner*, 144 N. Y. 119, 38 N. E. Rep. 1003.

<sup>3</sup> *R. v. Mills*, 7 Cox C. C. 263 (*semble*); *R. v. Hensler*, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570. See *C. v. Starr*, 4 All. 301.

<sup>4</sup> *In re Bozeman*, 42 Kan. 451, 22 Pac. Rep. 628; *S. v. Ellis*, 4 Vr. 102, 97 Am. Dec. 707.

<sup>5</sup> *C. v. Jacobs*, 9 All. 274.

<sup>6</sup> *R. v. Griffith*, 1 C. & P. 298. See *R. v. Brown*, 63 J. P. 790.

<sup>7</sup> *R. v. Collins*, L. & C. 471, 33 L. J. M. C. 177, 10 Jur. N. s. 686, 10 L. T. Rep. 581, 12 W. R. 886, 9 Cox C. C. 497, so held, following the earlier case of *R. v. McPherson*, D. & B. 197, 26 L. J. M. C. 134, 3 Jur. N. s. 523, 5 W. R. 525, 7 Cox C. C. 281. In the latter case the goods intended to be stolen were named in the indictment, and it was proved that they were not in the house; and two of the judges put their judgments distinctly on this ground. Other judges, however, decided the case on the ground that the attempt was impossible of fulfillment. See *R. v. Johnson*, L. & C. 489, 34 L. J. M. C. 24, 10 Jur. N. s. 1160, 11 L. T. Rep. 389, 13 W. R. 101, 10 Cox C. C. 13, where it was held that the goods intended to be stolen need not be described in the indictment.

<sup>8</sup> *R. v. Ring*, 61 L. J. M. C. 116, 66 L. T. Rep. 300, 17 Cox C. C. 491, 56 J. P. 552.

<sup>9</sup> *R. v. Brown*, 24 Q. B. D. 357, 59 L. J. M. C. 47, 61 L. T. Rep. 594, 38 W. R. 95, 16 Cox C. C. 715, 54 J. P. 408.

has always been recognized to be the law. One who tries to pick an empty pocket is guilty of attempt to commit larceny.<sup>1</sup> So it is held burglary to break into a dwelling-house in the night time with intent to steal whatever is in it, though there is nothing in it to be subject of larceny,<sup>2</sup> or not enough to make the offense grand larceny and therefore felonious.<sup>3</sup>

It might be claimed that since there is nothing to take from the pocket the act intended cannot be a criminal act, and therefore there can be no criminal attempt. But the act intended is not merely putting the hand into the pocket, but also clasping it around something within the pocket and pulling it out; and the actor fails to do the act he set out to do if nothing is removed from the pocket. If that is true, a successful accomplishment of his act would obviously have been criminal, and the act is therefore a criminal attempt. If, however, the immediate purpose of the defendant was merely to feel in the pocket to see if there was anything in it, there was no criminal attempt, though if anything was discovered in the pocket the defendant would doubtless have tried to get it out.<sup>4</sup>

A class of cases in which this general principle appears to have been lost sight of by the courts consists of cases where boys under the age of fourteen have tried to commit rape. The indictment is sometimes for attempt, usually for assault with intent to commit rape; and it is almost universally held that since the boy cannot by law be guilty of rape he cannot be guilty of the attempt or the assault with intent.<sup>5</sup> Different reasons have been suggested for this rule. The commonest (though hardly convincing) is that the defendant being presumed, whether conclusively or not, to be incapable of rape, is presumed incapable of intending to commit rape. "It is a logical solecism," said one court,<sup>6</sup> "to say that a person can intend

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<sup>1</sup> *S. v. Wilson*, 30 Conn. 500; *Hamilton v. S.*, 36 Ind. 280, 10 Am. Rep. 22; *C. v. McDonald*, 5 Cush. 365; *C. v. Sherman*, 105 Mass. 169; *P. v. Jones*, 46 Mich. 441; *P. v. Moran*, 123 N. Y. 254, 25 N. E. Rep. 412; *S. v. Utley*, 82 N. C. 556; *Clark v. S.*, 86 Tenn. 511.

<sup>2</sup> *S. v. Beal*, 37 Oh. St. 108, 41 Am. Rep. 490.

<sup>3</sup> *Harvick v. S.*, 49 Ark. 514.

<sup>4</sup> *R. v. Taylor*, 25 L. T. Rep. 75.

<sup>5</sup> *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Phillips*, 8 C. & P. 736; *R. v. Waite*, [1892] 2 Q. B. 600; *R. v. Williams*, [1893] 1 Q. B. 320; *S. v. Handy*, 4 Harr. (Del.) 566 (*semble*); *McKinny v. S.*, 29 Fla. 565, 10 So. Rep. 732; *P. v. Randolph*, 2 Park. Cr. 213; *S. v. Sam*, 1 Winst. 300; *Foster v. C.*, 96 Va. 306, 31 S. E. Rep. 503. *Contra*, *Davidson v. C.*, 20 Ky. L. Rep. 540, 47 S. W. Rep. 213; *C. v. Green*, 2 Pick. 380.

<sup>6</sup> *S. v. Sam*, *supra*.

to do what he is physically impotent to do ;” a line of reasoning which would seem to prove it impossible for a man to intend to lead a Christian life. Another court<sup>1</sup> stated the same idea in other language :

“The accused being under fourteen years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate.”

Why not, one might ask, is the weaker and less skilled of two contending foot-ball teams incapable of trying to win the game? The logic of the Massachusetts court was sounder, if less dramatic :<sup>2</sup> “An intention to do an act does not necessarily imply an ability to do it.”<sup>3</sup>

When the case is reversed, the court appears to have no difficulty. One may be convicted of attempt or assault with intent to ravish, though, owing to the youth or other quality of the object of the attack, the crime is impossible of accomplishment.<sup>4</sup>

A class of cases which seems at first opposed to the doctrine just laid down consists of prosecutions for the statutory offense of attempt to discharge a loaded firearm. The defendant is acquitted if there was no priming ;<sup>5</sup> but this is not on the ground that there is no attempt, but that the firearm is not loaded. The same reason leads to acquittal where the flint is lacking,<sup>6</sup> and where the touch-hole is plugged.<sup>7</sup> Similarly one cannot be guilty of the statutory offense of “attempting to discharge firearms by drawing the trigger or similar means” where the pistol was not cocked.<sup>8</sup> On the other hand, the firearm is loaded under the statute when (being a revolver) it contains an unused cartridge, though the hammer happens to fall upon a spent cartridge.<sup>9</sup>

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<sup>1</sup> *Foster v. C.*, *supra*.

<sup>2</sup> *C. v. Green*, *supra*.

<sup>3</sup> *Williams v. S.*, 14 Oh. 222, 45 Am. Dec. 536, is sometimes wrongly cited as in agreement with the Massachusetts case. It simply held that the presumption of inability to commit rape might be rebutted.

<sup>4</sup> *R. v. Brown*, 24 Q. B. D. 357 ; *C. v. Shaw*, 134 Mass. 211 ; *Rhodes v. S.*, 1 Coldw. 351.

<sup>5</sup> *R. v. Carr*, Russ. & Ry. 337 ; *R. v. James*, 1 C. & K. 530, 1 Cox C. C. 78 ; *R. v. Gamble*, 10 Cox C. C. 545.

<sup>6</sup> *R. v. Lewis*, 9 C. & P. 523 ; and see *Mulligan v. P.*, 5 Park Cr. 105.

<sup>7</sup> *R. v. Harris*, 5 C. & P. 159.

<sup>8</sup> *R. v. St. George*, 9 C. & P. 483.

<sup>9</sup> *R. v. Jackson*, 17 Cox C. C. 104.

Another statutory offense of a similar nature is shooting at another with intent to kill. On this charge it has been held in England that the defendant may be convicted though in fact the gun was not so loaded as to be capable of killing.<sup>1</sup> In this country, however, it is held, it would seem wrongly, that the defendant cannot be convicted if the gun was insufficiently loaded.<sup>2</sup> But where the charge was merely assault with intent to kill, the defendant was convicted though he made the assault with a gun which in fact was not loaded.<sup>3</sup>

Still another set of decisions must be distinguished as turning upon the language of a statute. A statute punishes the administration of a noxious thing with intent to procure an abortion. To come under the statute the substance must be poisonous,<sup>4</sup> and therefore if it is harmful only in large quantity, a small quantity, not being noxious, does not satisfy the statute.<sup>5</sup> The substance must also be administered; that is, it must reach the stomach of the victim.<sup>6</sup> But if it is noxious and is administered with the required intent, the crime is committed, although the poison is not calculated to accomplish the object.<sup>7</sup>

In several similar cases the possibility of success is not regarded. Assault with intent to kill by poison may be committed though the poison cannot kill.<sup>8</sup> So on an indictment for administering with intent, it appeared that the poison was a berry which, when administered, was contained in a harmless pod; the pod was so hard that the victim could not digest it, and it passed out from the victim's body unbroken. The defendant was held guilty.<sup>9</sup> The defendant may be convicted of using a noxious thing or an instrument with intent to cause abortion, though the woman is not with child.<sup>10</sup>

<sup>1</sup> *R. v. Kitchen*, Russ. & Ry. 95. *R. v. Abraham*, 1 Cox C. C. 208, which seems *contra*, appears to have been decided upon the special facts proved.

<sup>2</sup> *Allen v. S.*, 28 Ga. 395; *S. v. Swails*, 8 Ind. 524, 65 Am. Dec. 772; *Vaughan v. S.*, 3 Sm. & M. 553; *Henry v. S.*, 18 Oh. 32.

<sup>3</sup> *Mullen v. S.*, 45 Ala. 43, 6 Am. Rep. 691.

<sup>4</sup> *R. v. Powles*, 4 C. & P. 571; *S. v. Clarissa*, 11 Ala. 57.

<sup>5</sup> *R. v. Hennah*, 13 Cox C. C. 547.

<sup>6</sup> *R. v. Cadman*, Car. Supp. 237, 4 C. & P. 370; *Sumpter v. S.*, 11 Fla. 247.

<sup>7</sup> *R. v. Phillips*, 3 Camp. 73; *R. v. Coe*, 6 C. & P. 403; *Dougherty v. P.*, 1 Col. 514; *S. v. Fitzgerald*, 49 Ia. 260, 31 Am. Rep. 148; *S. v. Owens*, 22 Minn. 238; *S. v. Gedicke*, 43 N. J. L. 86; *C. v. W.*, 3 Pitts. 463.

<sup>8</sup> *S. v. Glover*, 27 S. C. 602, 4 S. E. Rep. 564.

<sup>9</sup> *R. v. Cluderay*, 1 Den. C. C. 515, 2 C. & K. 907, T. & M. 219, 19 L. J. M. C. 119, 14 Jur. 71, 4 Cox C. C. 84.

<sup>10</sup> *R. v. Goodhall*, 1 Den. C. C. 187; *C. v. Tibbetts*, 157 Mass. 519, 32 N. E. Rep. 910.

## III. DANGEROUS PROXIMITY TO SUCCESS.

The attempt must come sufficiently near completion to be of public concern. How near to success the attempt must come is obviously a question of degree to be determined in each case upon the special facts of the case. Attempts have been made to find a legal test to satisfy this question. It has been suggested for instance that to be punishable an attempt must be the last act before success; there must remain no *locus pœnitentiæ*.<sup>1</sup> But while such a formula may sometimes furnish a useful suggestion for determining the question, it cannot properly be regarded as a legal rule.<sup>2</sup> As Holmes, C. J., said, in *Commonwealth v. Peaslee* :<sup>3</sup>

“That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus pœnitentiæ*, in the need of a further exertion of the will to complete the crime.”

In fact, literal adherence to the rule suggested would probably prevent punishment in most cases charged as attempts, since the final act before complete success will seldom be accomplished without success following. Most decided cases of attempt, it will be found, are far from being the last acts before complete success.

The same general doctrine has been put in other forms. Thus it has been laid down that to be a punishable attempt the defendant's act, unless interrupted by natural causes outside his control, should necessarily result in the criminal act.<sup>4</sup> “Unless the transaction had been interrupted as it was, the prisoner would have actually carried away the meat.”<sup>5</sup> As Parke, B., said in *Regina v. Eagleton* :<sup>6</sup>

“If in this case any further step on the part of the defendant had been necessary to obtain payment, . . . we should have thought that the obtaining credit with the relieving officer would not have been sufficiently prox-

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<sup>1</sup> *Lovett v. S.*, 19 Tex. 174.

<sup>2</sup> *Uhl v. C.*, 6 Gratt. 706.

<sup>3</sup> 177 Mass. 267, 272, 59 N. E. Rep. 55.

<sup>4</sup> *U. S. v. Stephens*, 8 Sawy. 116; *Sipple v. S.*, 46 N. J. L. 197.

<sup>5</sup> BLACKBURN, J., in *R. v. Cheeseman*, 31 L. J. M. C. 89, 90.

<sup>6</sup> 24 L. J. M. C. 158, 166.

mate to the obtaining the money. But on the statements in this case no other act on the part of the defendant would have been required. It was the last act *depending upon himself* towards the payment of the money, and therefore it ought to be considered as an attempt."

But this attempt to find an arbitrary rule must also be dismissed. The test loses sight of the real reason for punishing attempts, that is, the danger to the public. Very many punishable attempts fail of success though not interrupted by natural causes or by other persons than the defendant, for instance, shooting at an enemy with an ill-aimed pistol; on the other hand, many acts are punishable though to attain success they must be followed by other acts of the defendant himself, as in the series of cases on attempts to commit burglary and arson, stated later. Indeed, all the cases where a man is punished for attempt though he repented and gave up his project before success are opposed to the proposed test.<sup>1</sup>

The true doctrine has been so well stated by Mr. Justice Holmes that it is unnecessary to do more than quote his words: <sup>2</sup>

"An act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But, on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head was not aimed straight, and therefore, in the course of nature, could not hit him. Usually, acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. . . . Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. . . . In the

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<sup>1</sup> See particularly *Glover v. C.*, 86 Va. 382, 10 S. E. Rep. 420; *R. v. Goodman*, 22 U. C. C. P. 338.

<sup>2</sup> In *C. v. Kennedy*, 170 Mass. 18, 20, 48 N. E. Rep. 770.



case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts ; e. g. in the case of treason (Fost. Crown Law, 196 ; *Rex v. Cowper*, 5 Mod. 206), or in that of pursuit by a negro with intent to commit rape (*Lewis v. State*, 35 Ala. 380)."

The act of attempt to be punishable must be more than mere preparation ; a step must be taken which can be regarded as the beginning of the actual commission of the crime intended.<sup>1</sup> In the leading case<sup>2</sup> on the subject *Field, C. J.*, said :

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offense ; the attempt is the direct movement toward the commission after the preparations are made."

The difference between an act of preparation and an attempt is merely one of degree, and is exceedingly difficult to apply. In *People v. Murray*<sup>3</sup> the charge was an attempt to contract an incestuous marriage ; the defendant eloped with his niece, and tried to secure a magistrate to perform the ceremony ; it was held that a punishable attempt had not been committed. In *United States v. Stephens*<sup>4</sup> the charge was an attempt to introduce liquor into Alaska ; the defendant sent to San Francisco an order for liquor to be shipped to him in Alaska ; he was discharged. In *United States v. Riddle*<sup>5</sup> a false invoice was made by the exporter in Liverpool with intent to defraud the revenue ; it was held not to be an attempt to defraud.<sup>6</sup> On the other hand, in *Regina v. Cheeseman*<sup>7</sup> a servant who, intending later to steal his master's property, put it to one side so that he could easily make way with it, was held guilty of an attempt to steal.<sup>8</sup> In *Cunningham v. State*<sup>9</sup> the defendant had had sent to him and had received from the express company certain printed forms of auditor's warrants with stamps for impressing the auditor's seal ; he was held guilty of an

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<sup>1</sup> *U. S. v. Stephens*, 8 Sawy. 116 ; *P. v. Murray*, 14 Cal. 159 ; *Jackson v. S.*, 103 Ga. 417, 30 S. E. Rep. 251 ; *Sipple v. S.*, 46 N. J. L. 197 ; *Lovett v. S.*, 19 Tex. 174.

<sup>2</sup> *P. v. Murray*, *supra*.

<sup>3</sup> 14 Cal. 159.

<sup>4</sup> 8 Sawy. 116.

<sup>5</sup> 5 Cr. 311 ; *acc.* *U. S. v. Twenty-eight Packages of Pins*, Gilp. 306.

<sup>6</sup> For other instances of mere preparation, see *P. v. Compton*, 123 Cal. 403, 56 Pac. Rep. 44 ; *Brown v. S.*, 95 Ga. 481, 20 S. E. Rep. 495 ; *Lovett v. S.*, 19 Tex. 174.

<sup>7</sup> 9 Cox C. C. 100.

<sup>8</sup> See *P. v. Mann*, 113 Cal. 76, 45 Pac. Rep. 182.

<sup>9</sup> 49 Miss. 685.

attempt to forge auditor's warrants. In *Regina v. Brown*<sup>1</sup> the court intimated that merely drawing a loaded pistol from the pocket for the purpose of killing is a punishable attempt to kill.<sup>2</sup> In *People v. Stites*<sup>3</sup> the defendant procured a dynamite bomb and started from his house to put it on the railroad track, but was arrested at some distance from the track; he was held guilty of an attempt to obstruct the track. In *Territory v. Reuss*<sup>4</sup> the defendant put a lighted bomb on the porch of a house and attempted to call an inmate of the house to the door; this was a punishable attempt to kill.<sup>5</sup> In several cases it has been held that where the defendant made false representations for the purpose of getting property, but the deceit was discovered before the property was given up, he was guilty of an attempt to obtain by false pretences.<sup>6</sup>

A series of cases on indictments for attempt to commit arson illustrate the nice distinctions required. The defendant bought matches to set the fire; he cannot yet be punished.<sup>7</sup> He solicited another to burn and furnished him with materials; there is no punishable attempt.<sup>8</sup> He prepared combustibles at the house, went to a third party, solicited him to set the fire, and started with him toward the house. Query — whether a punishable attempt has been committed.<sup>9</sup> The combustibles were arranged and another who was on the spot was solicited to light it; the attempt is punishable.<sup>10</sup> The defendant himself having arranged the combustibles lit a match, which went out,<sup>11</sup> or lit a candle and placed it among

<sup>1</sup> 10 Q. B. D. 381, 52 L. J. M. C. 49, 48 L. T. Rep. 270, 31 W. R. 460, 15 Cox C. C. 199, 47 J. P. 327.

<sup>2</sup> In the similar case of *Burton v. S.*, 109 Ga. 134, 34 S. E. Rep. 286, where the pistol was caught in the coat lining, it was held not to amount to an assault with intent to kill.

<sup>3</sup> 75 Cal. 570, 17 Pac. Rep. 693.

<sup>4</sup> 5 Mont. 605.

<sup>5</sup> For other cases where the act had gone far enough to be punishable see *R. v. Chapman*, 1 Den. C. C. 432; *Lewis v. S.*, 35 Ala. 380; *Clark v. S.*, 86 Tenn. 511, 8 S. W. Rep. 145.

<sup>6</sup> *R. v. Ball*, C. & M. 249; *R. v. Eagleton*, Dears. 515, 24 L. J. M. C. 158, 3 C. L. R. 1145, 1 Jur. N. S. 940, 4 W. R. 17, 6 Cox C. C. 559; *R. v. Rigby*, 7 Cox C. C. 507; *R. v. Cheeseman*, L. & C. 140, 31 L. J. M. C. 89, 8 Jur. N. S. 143, 5 L. T. Rep. 717, 10 W. R. 255, 9 Cox C. C. 100; *R. v. Hensler*, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570.

<sup>7</sup> *R. v. Taylor*, 1 F. & F. 511 (*semble*).

<sup>8</sup> *McDade v. P.*, 29 Mich. 50; *S. v. Bowers*, 35 S. C. 262, 14 S. E. Rep. 488. *Contra*, *McDermott v. P.*, 5 Park. Cr. 102; *P. v. Bush*, 4 Hill 133 (statutory).

<sup>9</sup> It is punishable under the statute: *C. v. Peaslee*, 177 Mass. 267, 59 N. E. Rep. 55.

<sup>10</sup> *S. v. Hayes*, 78 Mo. 307.

<sup>11</sup> *R. v. Taylor*, 1 F. & F. 511; *R. v. Goodman*, 22 U. C. C. P. 338.

the combustibles,<sup>1</sup> or actually lit the combustibles,<sup>2</sup> he has committed a crime.

Another interesting series of cases is upon indictments for attempt to commit burglary. The defendant takes an impression of a lock of the house in order to get a false key made; he is not yet guilty of a criminal attempt.<sup>3</sup> He procures tools and meets a confederate at a distance from the house; he is not guilty.<sup>4</sup> He hires a hack to go to the house; he is not guilty.<sup>5</sup> He reaches the house and looks at it to examine it; not guilty.<sup>6</sup> He carries his tools to the house, lays them down, and goes to get a tool he had forgotten,<sup>7</sup> or examines the house to pick out a fit place to break;<sup>8</sup> guilty. He breaks down the gate of the yard;<sup>9</sup> he goes up the steps to the porch;<sup>10</sup> he tries to break open the door;<sup>11</sup> he breaks glass in the window;<sup>12</sup> he breaks open the door and fires into the house;<sup>13</sup> he is undoubtedly guilty.

Other series of cases in which the line between preparation and punishable attempt has been considered are cases of attempted poisoning,<sup>14</sup> and of attempting to rescue a prisoner.<sup>15</sup>

It seems to be clear that the common-law misdemeanor of attempting to commit an offense cannot be accomplished by the solicitation of another to do an act. Attempt is the act of one who is himself to commit the intended offense, and if the offense is committed he will become principal; solicitation is the act of one who means to secure another to commit the intended offense, and if the offense is committed he will become (in case of a felony) accessory before the fact. A solicitor to a crime which he does

<sup>1</sup> *S. v. Johnson*, 19 Ia. 230.

<sup>2</sup> *S. v. Dennin*, 32 Vt. 158.

<sup>3</sup> In *Griffin v. S.*, 26 Ga. 493, he was held guilty of a statutory attempt; *sed quare*.

<sup>4</sup> *P. v. Youngs*, 122 Mich. 292, 81 N. W. Rep. 114.

<sup>5</sup> *Groves v. S.*, 42 S. E. Rep. 755 (Ga.).

<sup>6</sup> *R. v. McCann*, 28 U. C. Q. B. 514.

<sup>7</sup> *P. v. Lawton*, 56 Barb. 126 (perhaps statutory).

<sup>8</sup> *P. v. Sullivan*, 173 N. Y. 122, 65 N. E. Rep. 989.

<sup>9</sup> *C. v. Smith*, 6 Phila. 305.

<sup>10</sup> *C. v. Clark*, 20 Phila. 395, 10 Pa. Co. Ct. 444, 48 Leg. Int. 450.

<sup>11</sup> *S. v. Jordan*, 75 N. C. 27. *Contra*, *Fonville v. S.*, 62 S. W. Rep. 573 (Tex. Cr.).

<sup>12</sup> *R. v. Spanner*, 12 Cox C. C. 155; *C. v. Shedd*, 140 Mass. 451, 5 N. E. Rep. 254.

<sup>13</sup> *S. v. Montgomery*, 109 Mo. 645, 19 S. W. Rep. 221.

<sup>14</sup> *Peebles v. S.*, 101 Ga. 585, 28 S. E. Rep. 920; *R. v. Dale*, 6 Cox C. C. 14; *C. v. McLaughlin*, 105 Mass. 460; *C. v. Kennedy*, 170 Mass. 18, 48 N. E. Rep. 770.

<sup>15</sup> *Patrick v. P.*, 132 Ill. 529, 24 N. E. Rep. 619; *P. v. Webb*, 127 Mich. 29, 86 N. W. Rep. 406.

not intend to join in actually committing is therefore not guilty of an attempt.<sup>1</sup>

Thus in *Regina v. Williams*,<sup>2</sup> an indictment for attempt to administer poison by giving the poison to X, who knew its nature, with directions to administer it, it was held that the defendant must be discharged; but upon a subsequent indictment for a misdemeanor unnamed (obviously for a solicitation) the defendant was convicted.<sup>3</sup>

In several states a statutory definition of attempt has been adopted, to the effect that whoever shall attempt to commit an offense "and in such attempt shall do any act towards the commission of such offense" shall be guilty of a crime. Under this statute, solicitation, at least when united with any acts of mere preparation, has been held a punishable attempt.<sup>4</sup>

In considering whether an attempt has gone far enough to justify punishment it is immaterial that the defendant may voluntarily desist from his attempt before it succeeds. If his attempt went far enough to become dangerous to the public and therefore criminal, he had become guilty of a crime, and his subsequent repentance and withdrawal from the crime, whether voluntarily or from fear of detection, could not purge his guilt.<sup>5</sup> Even if he went further and himself prevented the consummation of the attempt, he would still remain guilty of what he had actually done.

#### IV. SUCCESS OF THE ATTEMPT.

If an attempt succeeds, it cannot be punished as an attempt; for in the nature of things a mere attempt must be unsuccessful. If, therefore, at the trial of an indictment for attempt the evidence proves that the crime intended has been committed, there must be

<sup>1</sup> *R. v. Williams*, 1 C. & K. 589, 1 Den. C. C. 39 (but see *R. v. Clayton*, 1 C. & K. 128, *contra*, on the ground that in misdemeanors all parties are principals — a doctrine which, however, does not mean that all parties are really actors); *McDade v. P.*, 29 Mich. 50; *P. v. Youngs*, 122 Mich. 292, 81 N. W. Rep. 114; *Stabler v. C.*, 95 Pa. St. 318, 40 Am. Rep. 653; *Hicks v. C.*, 86 Va. 223, 9 S. E. Rep. 1024; *S. v. Butler*, 8 Wash. 194, 35 Pac. Rep. 1093.

<sup>2</sup> *Supra*.

<sup>3</sup> CRESSWELL, J., in *R. v. Roberts*, Dears. 539, 25 L. J. M. C. 17.

<sup>4</sup> *Griffin v. S.*, 26 Ga. 493; *C. v. Peaslee*, 177 Mass. 267, 59 N. E. Rep. 55 (*semble*); *S. v. Hayes*, 78 Mo. 307; *P. v. Bush*, 4 Hill 133; *McDermott v. P.*, 5 Park. Cr. 102; *S. v. Bowers*, 35 S. C. 262, 14 S. E. Rep. 488. *Contra*, *P. v. Youngs*, *supra*.

<sup>5</sup> *Taylor v. S.*, 50 Ga. 75 (*semble*); *S. v. Elick*, 7 Jones (N. C.) 68; *Glover v. C.*, 86 Va. 382, 10 S. E. Rep. 420; *R. v. Goodman*, 22 U. C. C. P. 338.

an acquittal.<sup>1</sup> The success of an attempt, however, means the accomplishment of the entire *act* intended, not the attainment of a desired result. The defendant, intending to obtain property by false pretenses, made the pretenses and got the property; but the pretenses not being believed, the property was not given as a result of the pretenses, but for some other reason. The desired end has been attained without substantive crime; but the attempted criminal act not having been accomplished, the defendant is guilty of a criminal attempt.<sup>2</sup>

If, however, an attempt made in one jurisdiction succeeds in a different jurisdiction, there would seem to be no reason for refraining from punishing the attempt. The crime has been committed, the state injured, the injury is not merged in a greater offense; the attempt must be punished, or the offender will escape punishment, at least in this jurisdiction. And such appears to be the law.<sup>3</sup>

*J. H. Beale, Jr.*

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<sup>1</sup> *R. v. Nicholls*, 2 Cox C. C. 182; *Graham v. P.*, 181 Ill. 477, 55 N. E. Rep. 179. So of solicitation: *R. v. Luddington*, 9 C. & P. 79.

<sup>2</sup> *R. v. Mills*, 7 Cox C. C. 263 (*semble*); *R. v. Hensler*, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570; *P. v. Gardner*, 144 N. Y. 119, 38 N. E. Rep. 1003.

<sup>3</sup> *R. v. Krause*, 18 T. L. Rep. 238, 66 J. P. 121 (solicitation); *Regent v. P.*, 96 Ill. App. 189 (conspiracy); *S. v. Terry*, 109 Mo. 601, 19 S. W. Rep. 206 (*semble*).

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THE LOTTERY CASE. — With the exception of the Insular cases no decision of the Supreme Court in recent years has elicited so much comment as that lately handed down in the case of *Champion v. Ames*, 23 Sup. Ct. Rep. 321. The case, which came up on *habeas corpus* proceedings, decides that section one of the Act of 1895, prohibiting the transmission of lottery tickets between states, is not unconstitutional as applied to one who, for the purpose of disposing of them, causes gambling tickets having a commercial value to be carried from Texas into California by means of a common carrier engaged in interstate commerce.

In considering the case three points are to be borne in mind: first, that, unlike the vast majority of cases, the question of the power of a state to control commerce is only indirectly raised; second, that Congress has acted by an express declaration, and not by silence; and third, that the decision of the case necessarily includes a definition of the term "commerce." With respect to the first point it has been objected that, as this decision gives Congress power to legislate upon the subject, all state legislation will be invalidated, and consequently Congress can force lottery tickets upon a state against its will. This is probably true, but it does not seem much more calamitous than that by mere silence Congress can force liquor down a state's unwilling throat. *Leisy v. Hardin*, 135 U. S. 100. With regard to the extent of the direct power of Congress over interstate commerce the minority objected that the power to regulate does not include the power to destroy, and further that Congress has no police power. The first objection seems to be answered by a century's acquiescence in the embargo cases; the second by the argument that the power to regulate should not



be cut down merely because a certain Act, besides regulating, happens also to protect the morals or health of the community.

The cardinal objection, however, which is made to the principal case, is that the transaction was not "commerce." In defining this term Chief Justice Marshall has said that it is more than traffic, it is intercourse; and the cases have decided that it includes navigation, and the transportation of persons. *Gibbons v. Ogden*, 9 Wheat. (U. S. Sup. Ct.) 1; *Head Money Cases*, 112 U. S. 580. But both text-writers and courts have united in declaring that only when there is a prospective sale, barter, or exchange does the term include the transportation of property. See 2 STORY, CONST. § 1061, note; *Hooper v. Cal.*, 155 U. S. 648. It may well be doubted whether a broader definition will not eventually prevail. For, if to carry a person for hire is commerce — as it unquestionably is — the same should logically be true of the carriage of property for hire. The mere payment of compensation, irrespective of any sale or exchange, or of the status of the transporter as a common carrier, results in a commercial transaction. In the principal case, however, it was urged that as these tickets were not legally vendible in either California or Texas they were not subjects of commerce, and that they could not be made such merely through transportation by a carrier. To these arguments there are two valid replies: first, that traffic in forbidden articles does exist in fact, and therefore, as commerce is a question not of law but of fact, does constitute commerce; and second, that the existence of commerce is often determined not so much by the intrinsic nature of the thing carried as by the nature of the instrumentality of carriage. In accord with this view is a recent statement by the Supreme Court that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain. . . ." *Hanley v. Kansas, etc., Ry. Co.*, 23 Sup. Ct. Rep. 214. In this connection, however, it is imperative to note that a party who merely ships goods subject to interstate commerce does not thereby necessarily become engaged in interstate commerce. *Kidd v. Pearson*, 128 U. S. 1.

In fact, this distinction is really decisive of the principal case. Lottery companies are not engaged in interstate commerce, and are therefore subject to control by the state; lottery tickets when sent beyond the state are subjects of interstate commerce and therefore within the control of Congress. Technically the decision stands for this, and nothing more. Broadly it is another sign of the times. Taken with the rejuvenation of the Sherman Act by the Addyston Pipe Company case, the recent beef-trust decision, the energy of the government as exemplified by its prosecution of the Northern Securities Company, and the establishment of the Department of Commerce, it marks the tendency towards an obliteration of state lines and a centralization of power in the federal government.

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**FRAUD WITHOUT DAMAGE AS GROUND FOR RESCISSION.** — In spite of the vast amount of judicial consideration of the subject of fraud, it has apparently remained for a recent case to raise the interesting question whether a suit for rescission on the ground of fraud may not be maintained although there is no damage to the plaintiff, when there is damage to a third party. The plaintiff had made an oral agreement with his neighbor not to sell his summer residence to anyone who would use it for an improper

purpose. To carry out this moral obligation, he refused to sell to the defendant. Thereupon the latter employed an agent, who, by fraudulently representing that his purchase was for an unobjectionable third person, obtained a deed, and conveyed over to the defendant. The plaintiff received his own price for the property, but in spite of the absence of damage to the plaintiff, the court set aside the deed. *Brett v. Cooney*, 53 Atl. Rep. 729 (Conn.).

It is well settled that if in this case conveyance had not yet been made, a court of equity would have refused the defendant specific performance. *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557. But a reason sufficient to justify such a refusal would not necessarily be sufficient to warrant affirmative relief as in the principal case. *Cadman v. Horner*, 18 Ves. 10. On the contrary, the law is usually stated to be that where the plaintiff has suffered no damage, affirmative relief will be given neither at law nor in equity. See 1 BIGELOW, FRAUD 540; see also *Mahoney v. Whyte*, 49 Ill. App. 97.

Where there has been no damage to anyone, it is admitted that no action of any kind can lie. A plaintiff cannot sue for damages, for he has suffered none. He cannot sue to rescind and set aside the deed, for equity will not move in an idle suit: substantial interests must be involved. But where there is damage to someone, the reason of the rule in this latter case is satisfied. Given a plaintiff defrauded, an equity affecting the conscience of the defendant, and a serious injustice to be corrected, it seems a decree should issue. The fact that the person protected is a third party should make no difference. The third party must of course be without a remedy of his own. Thus relief was refused in *Dawson v. Graham*, 48 Ia. 378, and in *Union Bank v. Osborne*, 4 Humph. (Tenn.) 413. But if he is helpless, every dictate of conscience would urge a court of equity to assist the defrauded plaintiff in his efforts to relieve him. The only possible objection to so equitable a result would be some contrary claim in the defendant; but he, certainly, neither has an absolute right to retain the results of his fraud, nor deserves any tenderness at the hands of the court.

On this reasoning the principal case is believed to be sound. No decision directly against it has been found. It is authority for the proposition that though there can be no action for fraud without damage, yet in cases of rescission the damage need not always be damage to the plaintiff.

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INTERCHANGE OF MAJORITY STOCK BY CORPORATIONS TO SECURE TO EACH THE CONTROL OF THE OTHER. — The exceptionally liberal policy of New Jersey toward her own corporations having the power of holding stock in other corporations seems to have suffered a modification in a recent decision of the Court of Chancery in that state. The Prudential Insurance Company of America, a New Jersey corporation, has power to "purchase" stock in other corporations "for investment." A majority of its stock is owned by its directors, several of whom are also on the board of the Fidelity Trust Company, another New Jersey corporation. An agreement was entered into by the two boards by which the Fidelity Company was to double its capital stock and turn over the entire new issue to the Prudential Company, which already owned one-third of the original stock. At the same time the directors of the Prudential Company were to sell from their holdings in that company a majority of its stock to the Fidelity Company.

The ultimate purpose was to secure to the existing directors of the Prudential Company and the successors whom they should name permanent control of its affairs. This was to be accomplished by having the annual meetings of the Prudential Company before those of the Fidelity Company, so that the board of the latter company would always be elected by the board of the former and would in turn re-elect the old directors of the former. Two minority stockholders of the Prudential Company sought to restrain their directors from carrying out the plan, and an injunction was granted. *Robotham v. Prudential Ins. Co. of America*, 53 Atl. Rep. 842. The main ground of the decision was that the plan was *ultra vires*, and in breach of the duty of the directors, as fiduciaries, to the minority stockholders.

It is well settled that directors are in a fiduciary relation to the stockholders, and must manage corporate affairs strictly in the interest of all. *Wardell v. Union Pacific R. R. Co.*, 103 U. S. 651. Any arrangement whereby the voting power is separated from the beneficial interest in the stock is obviously likely to be injurious to the interests of the other stockholders, and unless it can be shown to be for the best interests of all concerned, and not in furtherance of the plans of any faction, the arrangement is illegal and will be enjoined. *Kreissl v. Distilling Co. of Am.*, 61 N. J. Eq. 5. Indeed it has been held that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the corporation. *Shepaug Voting Trust*, 60 Conn. 576. If the arrangement in the principal case had been completed, the directors of the Prudential Company need have held only enough shares to qualify. All the vices of the voting trust or pool would thus have been present, with the added feature that the scheme would have been irrevocable and self-perpetuating. There was no imputation of fraud in fact, but it is clear that the plan was mainly, if not entirely, for the benefit of the majority stockholders at the expense of the minority. As a result of it the effective voting power of the minority would have been forever lost, and the value of their shares consequently much diminished, the potentiality of control being very valuable, especially in the case of a corporation with a large surplus to be invested. It seems clear that the use of several millions of the corporate funds to effect such an arrangement was a violation of the rights of the minority stockholders, and was properly enjoined.

The court took the position that the authority to "purchase" stock conferred the right, not to subscribe for a new issue of stock, but only to buy shares already on the market. This seems to be a very narrow construction, in view of the fact that the result is precisely the same in both cases, and that it is frequently much more advantageous to acquire stock by subscription than to buy it later. No other authority seems to go to this length, although one case has been found holding that such power did not authorize subscription for stock in a corporation later to be formed. *Commercial Fire Ins. Co. v. Burns*, 99 Ala. 1.

It was also held, and it would seem properly so, that this use of the corporation funds was not an "investment," because the purpose was in no wise to secure from it an income.

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ALTERATION OF PRINCIPAL OBLIGATION OR VARIATION OF RISK AS DEFENSE TO SURETY. — A somewhat extreme application of the doctrines regarding variation of a surety's risk is presented in a late Arkansas case.

The defendant was surety on a building contract which contained a clause providing that the employer might direct changes as the work progressed. A change was made, with the contractor's consent, which, while material, did not affect the fundamental features of the contract. It was held that the clause authorizing changes referred only to minor details of the work and that the surety was discharged. *Erfurth et al. v. Stevenson*, 72 S. W. Rep. 49. The case applies the general rule that a surety is released whenever the risk assumed by him has without his consent been increased. This principle seems often to have been somewhat confused, in terminology at least, with the entirely distinct doctrine that a surety is discharged if the principal obligation is altered.

The term alteration in this connection is strictly applicable only to actual changes upon the face of a written instrument. See BOUV. LAW DICT. *sub tit. Alteration*. The general rule regarding alteration is that, if material, it entirely avoids the instrument. *Master v. Miller*, 4 D. & E. 320, 330. In the case of specialties this rule would seem, in its origin at least, to be based on the technical common law principle that the obligation of a specialty has no existence apart from the document itself. Material alteration of the document would, therefore, be destruction of the obligation itself. *Pigot's Case*, 11 Co. 26 b. The courts, however, have finally held that all written instruments are alike avoided by alteration. *Master v. Miller, supra*. See DE COLYAR, LAW OF GUARANTEES, 3rd ed. 383. This broad rule seems to be founded, not on any technical doctrine, but upon considerations of policy, — that an obligee who has altered the instrument, or at least failed to preserve it unaltered, has thus destroyed the best evidence of the obligation, and may not bring forward secondary evidence of its contents against the ever-favored surety. *Wood v. Steele*, 6 Wall. (U. S. Sup. Ct.) 80. GREENL. EV. 16th ed. § 565. These rules, however, have been relaxed by the courts where the obligee has not acted fraudulently. *Croswell v. Labree*, 81 Me. 44; see BRANDT, SURETYSHIP, 2nd ed. § 378.

On the other hand, variation of risk as a defense is based merely on the obvious principle that a surety shall not be held to a liability which is unfair or which lies outside his contract. In one class of cases, the defense seems to be available at law; in another, only in equity. The former cases are chiefly those in which the principal debtor and the creditor agree, without the consent of the surety, upon a modification of an original parol contract. If such change in the contract would in any respect increase the surety's risk, he may, under a legal plea, secure a complete discharge. *Whitcher v. Hall*, 5 B. & C. 269. As an equitable defense, variation seems available in any case in which, though the principal obligation may remain unchanged, a transaction takes place between the principal debtor and the creditor which might operate unfairly as against the surety. *Calvert v. London Dock Co.*, 2 Keen 638. A common example of this is presented by cases in which the creditor releases security which he holds for the principal debt. In applying the doctrine, however, equity will look to the substantial justice of the situation, and will accordingly still hold the surety liable in so far as the transaction complained of could not have caused him damage. *Dunn v. Parsons*, 40 Hun (N. Y.) 77.

The principal case is clearly one of variation of risk, and, assuming the accuracy of the court's interpretation of the clause regarding changes, the holding that a complete defense exists at law cannot be disputed. As to the question of interpretation, the case is more doubtful. It would seem that the object of the clause was to secure a flexibility very desirable in such

contracts, and that a less strict interpretation might, consistently with fairness to the surety, have more nearly effectuated the intention of the parties. *Cf. Drumheller v. Am. Surety Co.*, 71 Pac. Rep. 25 (Wash.).

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**COMPENSATION OF ASSISTANT PROSECUTOR BY PRIVATE PARTIES. —** Under the old common law both in England and America prosecution for crimes was left to counsel employed by private parties except in cases where the state was directly interested. Now, however, statutes giving to public prosecutors exclusive control of prosecution, except for certain minor offenses, are universal throughout the United States. An interesting question arising out of this change was recently discussed in the Montana courts. It was held that a district attorney may during the trial receive assistance from counsel privately employed and compensated. *State v. Tighe*, 71 Pac. Rep. 3. One judge dissented on the ground that, "The private attorney's client is a stranger to the action. The private attorney represents vengeance. The state's attorney paid by the people is expected to represent justice." Some courts agreeing with this dissenting opinion maintain that to allow privately employed assistants to appear for the state is inconsistent with our theory of criminal prosecution, besides being impliedly prohibited by statutes forbidding the taking of private fees by district attorneys. *Biemel v. State*, 71 Wis. 444. The weight of authority, however, even where such statutes exist, is clearly in accord with the principal case. *State v. Bartlett*, 55 Me. 200; *Keyes v. State*, 122 Ind. 527.

Under the old law compensation necessarily came from private sources in many cases. The private employment of assistant prosecutors was thus proper formerly, and there has been no express prohibition of the practice since. The only question then is whether the change in our system of prosecution for crime has impliedly excluded all private interference and aid. Criminal prosecution is now strictly an affair of the state. It is and always must be under the control of counsel employed by the government, and they as public officers cannot delegate their power. The ideal, it may be said, toward which our law is tending is the elimination of the idea of individual vengeance. The prosecuting attorney should seek the conviction and punishment of the prisoner, not for the satisfaction of the injured persons, but for the protection of society and the effect on the criminal himself. As a representative of the state he seeks the promotion of justice and occupies a position similar to that of the judge. In the management and the withdrawal of prosecutions he has important discretion. That he may be free to act in accordance with justice and the public interests he must remain independent and free from all obligation to the parties interested in securing convictions. The private employment of an assistant, it is urged, will inevitably introduce into the prosecution an undesirable element of partisanship.

In such an argument there is undoubtedly much force. If, however, the official public prosecutor himself is forbidden to receive compensation from private parties, and is left in full control, the policy underlying the statutes would seem to be well satisfied. The interest of the state will then be the paramount influence. All that the private attorney can do is to help forward that interest and so incidentally to satisfy his client. It is desirable that the state's attorney should be allowed to receive all necessary aid that he may successfully prosecute the guilty. Justice is best promoted, not by



a judicial impartiality on his part, but by a vigorous and carefully prepared presentation of his side of the case. It is doubtful, also, whether the theory that the state is the sole party in interest is sound. The injured parties as individuals have surrendered their natural right of punishment to the state, but it would seem that they retain an interest in the state's enforcement of that right. In some measure, then, the prosecutor represents them, and is under an obligation to accept their aid, that their wrongs may be requited and their future protection secured. Such participation cannot be demanded as an absolute right, but it seems desirable that the court should have discretion to allow it at the request of the district attorney.

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**PAYMENT OF FORGED BILLS BY DRAWEE.** — The rule has been laid down, and is regarded as well settled, that a drawee accepts or pays at his peril a forged bill in the hands of a holder in due course. *Price v. Neal*, 3 Burr. 1354. The most satisfactory explanation of this doctrine yet advanced seems to be that, as between two persons with equal equities, one of whom must suffer, the one having legal title should prevail. See 4 HARV. L. REV. 299. From this explanation writers on quasi-contracts have dissented, urging that the drawee should be allowed a recovery against the holder, as of money paid under a mistake of fact. See KEENER, QUASI-CONTR. 154-158. In support of this latter contention it is pointed out that the holder suffered his loss when he gave value for a worthless piece of paper, and that in retaining the money paid him by the drawee, he simply makes his loss good at the expense of one against whom he has acquired no claim whatever; in short, that the equity of the holder is an equity against his transferrer alone, and thus is not involved in the case at all. This criticism of the theory of "equal equities," as explaining the doctrine of *Price v. Neal*, seems to proceed on a misinterpretation. There are no equal equities involved, in the sense of equitable claims against the same person in respect to the same *res*. The doctrine simply means that, as between parties equally meritorious, a legal title will not be disturbed. Both parties have paid out their money under an innocent mistake as to the same fact; but the holder now has legal title to the money he has received or, in case the bill has been only accepted, to the contract obligation to pay. Consequently there is no reason in equity for depriving him of that legal title.

If, however, for any reason the parties are not equally meritorious, the principle does not apply. In a recent Washington case the holder bought without inquiry or identification checks presented by an unknown man. The drawee paid the checks, but was allowed to recover the amount when it appeared that the checks were forged. *Canadian Bank v. Bingham*, 71 Pac. Rep. 43. The holder's negligence made him less meritorious than the drawee, and hence the case fell outside the doctrine of *Price v. Neal*. If however both parties are equally negligent, it is difficult to see how the plaintiff can recover.

The cases where the transaction between the holder and the drawee is not a payment but a sale should be carefully distinguished. In such cases the holder impliedly warrants the genuineness of the instrument and should be held to his warranty. *Fuller v. Smith*, 1 C. & P. 197.



**LIMITATIONS ON POWER OF COURT TO DIRECT VERDICT.** — In almost every jurisdiction it is stated without qualification that the court will direct a verdict for one party, when, if the jury should find for the other, a new trial would be granted. A remarkable decision recently handed down by the Supreme Court of Missouri shows the extreme result which may be reached by the logical application of this unqualified test. A so-called "magnetic healer" in suing for libel introduced many witnesses who testified that they had been cured by his treatment. On appeal it was held that the trial judge erred in refusing to direct a verdict for the defendant; that where the evidence tends to prove what the court "knows" to be an impossibility, there is no question for the jury, even though a cloud of witnesses swear to it. *Weltman v. Bishop*, 71 S. W. Rep. 167. Insufficiency of evidence, or lack of credibility of witnesses, is undoubtedly a proper ground upon which to grant a new trial. If the same rule is to apply to the case of directing a verdict, it becomes strictly true that before there is a right to a trial by jury the court must be convinced, taking into consideration the sufficiency of the evidence and the credibility of the witnesses, that there is presented a question upon which reasonable men may differ. See 6 HARV. L. REV. 125.

The courts seem to have drifted into their present attitude on the question of directing a verdict without realizing its contrariety to certain other principles which they have expressly or tacitly recognized at the same time. Owing to the fact that the practice of directing a verdict has succeeded the old demurrer to evidence, it has frequently been stated that in directing a verdict the truth of the evidence and of all reasonable inferences which may be drawn from it is admitted. *Schuchardt v. Allens*, 1 Wall. (U. S. Sup. Ct.) 359, 370; *Mynning v. Detroit, L. & N. R. R. Co.*, 64 Mich. 93. Furthermore it is often said that the credibility of the witnesses is entirely for the jury. *Gannon v. Laclede Gas Light Co.*, 145 Mo. 502. Again, in the states generally there are statutes forbidding a judge to express any opinion as to the weight of the evidence. See *Norris v. Clinkscules*, 47 S. C. 4-8. Finally, there is the recognized constitutional right to trial by jury. This constitutional safeguard is of little substantial value if the jury is not to pass upon the weight of the evidence or the credibility of the witnesses. When a new trial is granted, it may be said that there is no denial of this right, for there is another jury trial. The same, however, cannot be urged in favor of directing a verdict, unless the upper court happens to reverse the ruling of the trial court. Furthermore, though the practice of granting new trials may be supported on the ground that it existed at the time the constitutional provisions were adopted, the present practice of directing verdicts, having grown up in the last half-century, cannot be regarded as impliedly recognized by the constitutions.

Because of these objections, the courts, in one state at least, have held that a verdict cannot be directed so long as there is a "scintilla" of evidence for the jury to consider. *Cincinnati St. Ry. Co. v. Wright*, 54 Oh. St. 181. A more reasonable view is laid down by an early Massachusetts case to the effect that a verdict will not be directed unless the evidence is such that the court would set aside any number of verdicts based upon it. *Denny v. Williams*, 5 Allen 1. In Wisconsin the courts direct a verdict only when the evidence and all reasonable inferences from it, if true, would not support a verdict as a matter of law. The credibility of the witnesses is entirely for the jury. *O'Brien v. Chicago & N. W. R. R. Co.*, 92 Wis. 340. The most satisfactory rule, however, seems to be that adopted by the federal courts, where the discretion of the judge is not restricted by statute.

When there is doubt as to the weight of the evidence or the credibility of the witnesses, the court may express an opinion and may even go into detail, but the final decision in this respect rests with the jury. *Mt. Adams, etc., Ry. Co. v. Lowery*, 74 Fed. Rep. 463. In this manner, while trial by jury is preserved intact, yet the jury may be restrained within the bounds of reason. See 21 AM. L. REV. 859.

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**LIABILITY OF OCCUPIERS OF LAND FOR NEGLIGENCE.** — It seems to be a commonly accepted opinion that a landowner is exempt, so far as acts upon his own land are concerned, from the general tort liability for damage resulting from want of care. His non-responsibility to trespassers is regarded as illustrative of his general status. On the other hand, his responsibilities to business visitors, licensees, etc., are regarded, not as applications of the fundamental principle that every man must use due care in his acts, but rather as obligations imposed upon the landowner only in exceptional cases. In their efforts to prove certain cases either within or without one of these exceptions, the courts have sometimes drawn confusing distinctions. A social guest, for example, is not entitled to the protection that is accorded to one coming on business, though the former's invitation is often the more apparent of the two, and though the business visitor may be regarded as willing to assume the greater risk. *Southcote v. Stanley*, 1 H. & N. 247. On the other hand, the injustice which would result in many cases from denying recovery to a trespasser has led some courts to hold that even to him the occupier of land owes a rather vaguely defined duty of care. *Cincinnati, etc., R. R. Co. v. Smith*, 22 Oh. St. 227. The turn-table cases are familiar instances of the conflict of opinion in this branch of the law. See *Frost v. Eastern R. R.*, 64 N. H. 220; *Keffe v. Milwaukee, etc., R. R. Co.*, 21 Minn. 207.

The length to which a court may go to fit a case to a rule was illustrated in a recent Maine decision. The plaintiff, who was waiting to enter the defendant's exhibition grounds, was injured by a bullet, owing to the defendant's negligence in the construction of a shooting gallery on the grounds. The court with great difficulty concluded that the plaintiff might be classed as a business visitor on the land, though he was not at the time on the defendant's land, but on a near-by railroad platform. *Thornton v. Maine State Agricultural Society*, 53 Atl. Rep. 979. The case seems to involve a confusing extension of the class of business visitors; but the result is undoubtedly correct. It is believed that the general confusion in the subject may be avoided by reversing the usual point of view, namely, that the landowner is not liable save in exceptional classes of cases, and regarding him as subject to the ordinary responsibilities for all negligent acts, with such exceptions as public policy, or the circumstances of the case may require. Thus as a matter of policy it may be necessary to the proper enjoyment of land that the owner be not compelled to keep his land in a safe condition for trespassers. Moreover, since trespassers are not ordinarily to be expected, due care under the circumstances may mean little or no care. On the other hand, since the same considerations of policy do not operate to an equal extent as against licensees and business visitors, and since their presence is more or less to be expected, the care required owing to the circumstances is greater, and accordingly the courts impose a greater responsibility. The rules of law applicable to these cases may be regarded as nothing more than

judicial generalizations as to what as a matter of fact is due care in each class of cases. According to this view, there would be no difficulty in holding a negligent defendant, as in the principal case, even though he could not be brought clearly within one of the established classes. The only peculiarity would be that the jury would have to determine the standard of due care, instead of having it settled for them as a matter of law. A few courts seem to assume the point of view contended for, though without a clear expression of it. Some cases, for instance, appear to make an owner's liability to business visitors depend on whether he had notice of their whereabouts at the time. *Broslin v. Kansas, etc., R. R. Co.*, 114 Ala. 398. Similarly the owner may be liable to a trespasser where trespassers are common and to be expected. *South & North Ala. Ry. Co. v. Donovan*, 84 Ala. 141. The circumstances relied upon would seem immaterial, except as they help to determine the standard of care.

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**AVOIDING STATUTE OF LIMITATIONS BY ACKNOWLEDGMENT OF DEBT.—** The apparent injustice of extinguishing a valid debt by a strict application of the statute of limitations led the courts at a comparatively early date to modify the effect of the statute by holding that any new promise to pay a debt thus barred revived the liability. The existing moral obligation was held a sufficient consideration to support the new promise. See *Philips v. Philips*, 3 Hare 281, 299. Subsequently, the mere acknowledgment of the existence of the debt was regarded as raising an implied promise to pay it. See *Sigourney v. Drury*, 31 Mass. 387. At first the theory by which the acknowledgment was regarded as reviving the debtor's liability was apparently that the statute merely raised a presumption of payment which might be rebutted. *Newlin v. Duncan*, 1 Harr. (Del.) 204. This, however, was too palpable a fiction. The logical result of it would be that the statutory bar might always be removed by proof that the debt had not, in fact, been paid. This would have rendered the statute entirely nugatory; consequently the whole theory has been generally discarded. A second theory suggested is that the acknowledgment is in effect merely a waiver of the statutory defense. To this explanation, however, there are several objections. In the first place, it is generally, though not universally, held that the new promise must be made before action brought, and not during the suit. *Bradford v. Spyker's Adm'r*, 32 Ala. 134. Again, if the new promise be conditional in form, it need be fulfilled only according to its terms. *Tanner v. Smart*, 6 B. & C. 603. Furthermore, the statute immediately begins to run on the new promise as though it were an independent cause of action. *Munson v. Rice*, 18 Vt. 53. In the face of these objections it would seem that the theory of waiver is untenable. The new promise is now considered as one of the essential elements on which the suit is founded. *Krebs v. Olmstead*, 137 Mass. 504.

Just what has been required by the courts in order to avoid the effect of the statute has varied from time to time. At one period the courts, influenced by the theory that the statute merely raised a presumption of payment, allowed almost any admission of the debt to take the case out of the statute. *Peters v. Brown*, 4 Esp. 46; *Bryan v. Horseman*, 4 East 599. The modern cases, recognizing that the action is in reality grounded upon the new promise, have required something nearer a promise in fact. To-day an acknowledgment of indebtedness must be clear and distinct. *Bell v.*

*Morrison*, 1 Pet. (U. S. Sup. Ct.) 351. It must be made directly to the creditor. *Wachter v. Albee*, 80 Ill. 47. It must not be coupled with words or circumstances indicating an intention not to pay the debt. *Bell v. Morrison*, *supra*. Indeed, some cases show a tendency to require positive indications of intention to pay. This is well illustrated by two recent decisions. *Wood v. Merrietta*, 71 Pac. Rep. 579 (Kan.) and *Lambert v. Doyle*, 43 S. E. Rep. 416 (Ga.). In both cases unqualified acknowledgments of indebtedness unaccompanied by any statements of an intention to pay were held insufficient.

On principle there seems to be no reason why the result of the statute of limitations as applied to debts should differ from that where it is applied to land. Though the statute in terms bars only the remedy, in land cases it is well settled that when the statutory period has run, a good title is conferred on the adverse possessor and the true owner's right is gone. *Inhabitants, etc., in Winthrop v. Benson*, 31 Me. 381. Such a theory is in its nature as applicable to debts as to land. Practically it might seem as harsh that a true owner should lose his land, as that a creditor should lose his debt. Yet the results in the cases of real estate have been generally recognized as desirable. It is to be regretted that the law as to debts is settled on opposing lines. In any event the recent cases noted above show a fortunate tendency to limit that doctrine.

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THE WABASH STRIKE INJUNCTION. — Whatever the law may have been a few years ago, it is unquestioned to-day that equity has the power to restrain the continuation of violent strikes. The Wabash Railroad injunction, restraining a peaceable strike, however, seems to have been an attempt by the court to impose upon railroad employees restrictions which more properly should have emanated from the legislature. Though the injunction was subsequently dissolved, the questions raised in the preliminary hearing are of such vital importance as to be worthy of comment. Wholly because the employees were employed by a public service company, certain labor leaders were restrained from bringing about a strike. *Wabash R. R. Co. v. Hannahan*, 56 Cent. L. J. 201 (decided Mar. 3, 1903, by Dist. Ct., E. D. Mo.).

Such a decision draws a positive distinction between the right of an ordinary laborer and that of a railroad employee to enter upon a peaceful strike. This is hardly justifiable in the present state of the law. It has been universally conceded that every workingman has a right to strike peaceably either alone, or in combination with others, no matter what injury is done thereby to private individuals. Is this right to be lessened when the public at large is injured? Beneath the surface of this question lies a sharp conflict between the individual's right of personal liberty in action and the community's right to continuous adequate service. Despite the undoubted importance of the latter, it must surely be more in consonance with the genius of our institutions that the former should prevail. Though there are several cases which assert that one who offers his services to a railroad impliedly gives up his right to quit when he pleases, it must be remembered that this language was not necessary for the decisions. and was used during the riots of 1894 when less emphatic words would have spelled anarchy. See *Toledo, etc., Ry. Co. v. Penn. Co.*, 54 Fed. Rep. 746; *United States v. Elliot*, 62 Fed. Rep. 801.

Assuming, however, that such injunctions are bad by common law principles, a further question arises whether the situation has been changed by the Sherman Act prohibiting combinations or conspiracies in restraint of trade or interstate commerce. If railroad employees were engaged in interstate commerce, a concerted strike would undoubtedly fall within the terms of the Act. But they are not so engaged. They are engaged in supplying labor to their employers, and, in theory at least, they are no more in interstate commerce than are the dealers who supply other commodities necessary for the running of a railroad. While it must be acknowledged that a strike tends almost necessarily to impede interstate commerce, such a result is purely incidental. The duty to the public is owed by the employers alone, not by the employees. See *People v. N. Y., etc., R. R.*, 28 Hun (N. Y.) 543. Thus it would seem that the Sherman Act cannot reasonably be considered to apply to strikes of such a nature. The law being as it is, the dissolution of the injunction in the principal case can be regarded only with satisfaction.

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## RECENT CASES.

**ADMIRALTY — SALVAGE CLAIM BY OWNER OF OFFENDING VESSEL — LIMITATION OF LIABILITY.** — A barge, sunk by fault of a tug, was raised by other vessels belonging to the owners of the tug. The tug-owners took the statutory proceedings to limit their liability to the value of the tug, and then claimed salvage for raising the barge. *Held*, that they are not entitled to salvage. *The Pine Forest*, 119 Fed. Rep. 999 (Dist. Ct., R. I.).

Where such services are rendered by the vessel at fault, no salvage is recoverable. See *The Clarita*, 23 Wall. (U. S. Sup. Ct.) 1, 18. In such cases, the courts apparently personify the vessel as the wrongdoer and hold her disqualified from claiming salvage. See *The Glengaber*, L. R. 3 A. & E. 534. This doctrine is obviously inapplicable where the assistance is rendered by vessels other than the offender. In those cases, therefore, the services could clearly, apart from statutes allowing limitation of liability, be set up in reduction of damages, or, it would seem, optionally by way of cross-action. See *The Glengaber*, *supra*. That the defendant avails himself of such statutes, should not deprive him of these rights. The contrary view plainly discourages such services, and involves the injustice of allowing the injured party to recover the full statutory damages and also to profit by the unremunerated labor of vessels under no legal duty to perform it. Obviously, however, the owners of the offending vessel should not be allowed as salvage a sum greater than their limited liability; for otherwise they would be permitted to make actual profit from their wrong.

**BANKRUPTCY — DISSOLUTION OF LIENS — EXECUTION SALE WITHIN FOUR MONTHS.** — A judgment was obtained against an insolvent debtor within four months of the filing of the petition in bankruptcy. His property was sold on execution, but before the return day of the writ the petition was filed. *Held*, that under § 67 *f* of the National Bankruptcy Act, the trustee in bankruptcy is entitled to the proceeds of the sale in the sheriff's hands. *Clarke v. Larremore*, 23 Sup. Ct. Rep. 363, affirming the decision of the Circuit Court of Appeals, *sub nom. In Re Kenney*, 105 Fed. Rep. 897.

The proceeds of an execution sale in the sheriff's hands before the return day of the writ cannot, according to the weight of authority, be attached as the property of the execution creditor. *Turner v. Fendall*, 1 Cranch (U. S. Sup. Ct.) 117; but see *Wehle v. Conner*, 83 N. Y. 231. Nor is the sheriff generally subject to garnishment in a suit against the creditor. *Marvin v. Hawley*, 9 Mo. 378. Until the writ is returned it is not fully executed and the creditor has no absolute claim to the proceeds. See FREEMAN, EXECUTIONS 577. Consequently the decision under discussion seems correct in holding that the right of the execution creditor, under such circumstances, is a lien rendered null and void by § 67 *f*. There have been, however, contrary decisions. *Re Seebold*,



105 Fed. Rep. 910; *Doyle v. Hall*, 86 Ill. App. 163. The court expressly refrains from stating an opinion as to the right of a trustee in bankruptcy to proceeds if already paid over to the execution creditor. However, the court's assertion that all liens within four months become null from their inception upon adjudication of bankruptcy, indicates that the drastic treatment of preferential payments by the Act may even be extended to entitling the trustee in such a case. See *Levor v. Seiter*, 69 N. Y. Supp. 987.

**BANKRUPTCY — PREFERENCES — EQUITABLE MORTGAGE OF PERSONALTY.** — The bankrupt, more than four months before the petition was filed, mortgaged by an unrecorded agreement all his property, present and to be acquired, to the defendant. Within four months of the filing of the petition, the defendant, having reasonable cause to know of the debtor's insolvency, took possession of all the bankrupt's property. There were no creditors who could have annulled the transfer. *Held*, that the trustee in bankruptcy can avoid the transaction. *Mathews v. Hardt*, 79 N. Y. App. Div. 570.

In New York a mortgage of after-acquired property creates an equitable lien. *Perley v. Dwight*, 132 N. Y. 59; *cf. N. Y. Security Co. v. Saratoga, etc., Co.*, 159 N. Y. 137. The defendant's right would thus seem to have been unimpeachable, on the principle that a trustee takes subject to all the equitable liens that affected the bankrupt. *Philadelphia v. Eckels*, 98 Fed. Rep. 485. To avoid giving the equitable lien or a preference in the distribution of assets, however, the court disregarded this principle and held that the defendant's right accrued only when he took possession of the property. But the doctrine of *Holroyd v. Marshal* is that the equitable lien attaches when the mortgagor's title accrues. See 13 HARV. L. REV. 598. Strictly therefore the equitable mortgagee should have a prior right to at least all property acquired by the mortgagee more than four months before the petition. In a conflict between the rights of the equitable mortgagee and of the general creditors the general policy in bankruptcy proceedings is favorable to the latter; but theoretically it is difficult to support the decision in the principal case.

**BILLS AND NOTES — FORGED CHECKS — DRAWEE'S RIGHT TO RECOVER.** — A bank cashed over its counter, without inquiry or identification, certain checks presented by an unknown man. The drawee paid the checks apparently without negligence. It appeared later that they were forged. *Held*, that the drawee may recover the money he has paid from the bank which cashed the checks. *Bank v. Bingham*, 71 Pac. Rep. 43 (Wash.). See NOTES, p. 514.

**BILLS AND NOTES — NEGOTIABILITY — WAIVER OF DEFENSE.** — A joint and several promissory note contained a clause that "no time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party." *Held*, that this does not invalidate the instrument as a promissory note. *Kirkwood v. Carroll*, 19 T. L. R. 253 (Eng., C. A.).

A promissory note, to be negotiable, must contain an unconditional promise to pay, not coupled with an independent promise to do anything else. A waiver of defenses, however, does not qualify the promise to pay, but rather strengthens it. Thus, it is held that a note coupled with a power of attorney to confess judgment if not paid at maturity is negotiable. *Osborn v. Hawley*, 19 Oh. 130. The result is the same when the maker waives exemptions and the right of appeal. *Zimmerman v. Anderson*, 67 Pa. St. 421; *contra, Bank v. Wheeler*, 75 Mich. 546. The principal case would seem to be analogous and the decision, therefore, sound. Although the stipulation here discussed is not included in the English Bills of Exchange Act among those stated as not invalidating a note, the court holds the provision of the Act not to be exclusive. *Yates v. Evans*, 61 L. J. Q. B. 446; *contra, Kirkwood v. Smith*, 1 Q. B. 582. The American act resembles the English on this point. Neg. Inst. Law, §§ 3, 5.

**CONFLICT OF LAWS — CAPACITY TO CONTRACT — COVERTURE AS DEFENSE.** — A married woman, incapable of contracting in Tennessee, made while resident there a promissory note. The note was sent by mail to a bank in Ohio, where a married woman may contract, in renewal of a note conceded to have been binding on her. Suit was brought on the renewal note in Tennessee. *Held*, that although there is a good contract by the law of Ohio, coverture is nevertheless a good defense in Tennessee. *First Nat'l Bank v. Shaw*, 70 S. W. Rep. 807 (Tenn.).

Ordinarily when a note is sent by mail by the maker to the payee the contract is made at the place of mailing. *Barret v. Dodge*, 16 R. I. 740. But when a note is in renewal, the contract is made at the place at which the first note is taken up. *Staples*



*v. Nott*, 128 N. Y. 403. This would seem a better ground for holding the note in the principal case an Ohio contract, than that taken by the court, namely, that Ohio is the place of performance. Since by the common law capacity to contract depends on the *lex loci contractus*, the contract here is a binding obligation. *Milliken v. Pratt*, 125 Mass. 374. Generally a valid contract will be enforced in a foreign state even if it could not there have been made legally binding. *Greenwood v. Curtis*, 6 Mass. 351. But the domestic law may refuse to give the contract effect if contrary to domestic public policy. *Emery v. Burbank*, 163 Mass. 326. As to whether it is against public policy, in a state where married women are incapable of contracting, to enforce contracts made by them abroad, opinions may well differ. Cf. *Milliken v. Pratt*, *supra*; *contra*, *Armstrong v. Best*, 112 N. C. 59.

**CONFLICT OF LAWS — GUARDIANS AND ADMINISTRATORS — INSURANCE POLICIES.** — On the death of a member of a beneficiary society a domiciliary guardian of the infant beneficiaries, and an ancillary guardian, who had possession of the insurance certificate, were appointed in different states. The latter guardian brought suit on the certificate first, but the former thereafter obtained judgment and payment, each having proceeded in the state of his appointment. *Held*, that the right of the ancillary guardian is barred. *Modern Woodmen of America v. Hester*, 71 Pac. Rep. 279 (Kan.).

The assumption of the court that a domiciliary administrator or guardian though not in possession of the insurance policy has the exclusive right to sue, has little support. *Accord*, *Ellis v. Northwestern M. L. I. Co.*, 100 Tenn. 177; *contra*, *Sulz v. Mutual R. F. L. Assn.*, 145 N. Y. 563. Some courts hold that either the domiciliary administrator, or the ancillary administrator in possession of the policy may sue, but that a pending action by one should bar the other on the principle of comity. See *Sulz v. Mutual R. F. L. Assn.*, *supra*. On general principles, either administrator may enforce a claim against the company as a debtor within his jurisdiction. In an action on an insurance policy, however, the plaintiff must produce the policy or satisfactorily account for it. The ancillary administrator has rightful possession of the policy and his right to sue seems perfect. If that is admitted, it would seem that the domiciliary administrator could not properly account for the non-production of the policy. Accordingly, in some jurisdictions the ancillary administrator is given an exclusive right to sue. *New York L. Ins. Co. v. Smith*, 67 Fed. Rep. 694. Under this view the decision of the principal case is incorrect since payment to the wrong claimant is no defense in the absence of special equities. See *Steele v. Connecticut G. L. I. Co.*, 31 N. Y. App. Div. 389; but cf. *Bull v. Fuller*, 78 Ia. 20.

**CONFLICT OF LAWS — TERRITORIAL LAWS — PLACE OF IMPRISONMENT.** — A statute of the United States provides that the legislative assemblies of the several territories may contract for the imprisonment in other territories and states of their convicts. The legislature of Oklahoma accordingly passed an act authorizing its governor to make such a contract with the proper authorities of some state. Under this law a contract was made with the directors of the Kansas penitentiary. The petitioner, an Oklahoma convict, confined in the Kansas penitentiary according to this arrangement, sued out a writ of *habeas corpus*. *Held*, that the writ should not be granted. *In re Terrill*, 71 Pac. Rep. 589 (Kan.).

But for the federal statute the detention of the petitioner would appear to be improper, for he would then undeniably be confined beyond the jurisdiction of the laws under which he is punished. *Regina v. Lesley*, 8 Cox C. C. 269. Such imprisonment, however, has been erroneously justified under the constitutional requirement that full faith and credit be given the judicial proceedings of other states. *In Re Maney*, 20 Wash. 509; see 12 HARV. L. REV. 567. But the principal case holds that the detention is warranted by virtue of the federal statute. The dissenting judges take the view that Congress merely granted permission to pass territorial laws, disregarding the futility of such laws, to authorize the detention of convicts beyond their jurisdiction. But the disposition of the case seems on the whole satisfactory. Had Congress enacted directly that Oklahoma convicts should be confined in states designated by the territorial governor, the petitioner's imprisonment would be unassailable. See *Ex parte Karstendick*, 93 U. S. 396. It is reasonable to regard this federal statute also as legalizing detention in states designated by the governor, though it becomes operative only when the territorial assemblies act under its provisions.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VESTED RIGHT IN ALIMONY,** — In 1892 the plaintiff obtained a decree of absolute divorce and annual alimony from the defendant. A statute passed in 1900 provides that the courts may subsequently vary decrees awarding alimony "whether heretofore or hereafter rendered." (N. Y.

Laws, 1900, c. 742.) In 1902 the defendant sought a reduction in the amount. *Held*, that in so far as the statute is retroactive it violates the constitutional provision against depriving a person of property without due process of law. *Livingston v. Livingston*, 173 N. Y. 377.

In a decree for separation the basis of the right to permanent alimony is only the common-law right of the wife to support, for the decree does not terminate the marriage relation and the incidental property rights are not affected. *Taylor v. Taylor*, 93 N. C. 418. Hence in the ecclesiastical courts the amount might be varied as the circumstances of the parties required. *Cox v. Cox*, 3 Add. 276. See *DeBlaquiere v. DeBlaquiere*, 3 Hag. Ecc. 322, 329. Such a claim to alimony would not seem to constitute a vested right. Absolute divorce, on the other hand, and the rights incidental to it are purely statutory. See 1 BL. COM. 441; 2 BISHOP, MAR. DIV. & SEP. § 1039. As it terminates the marriage relation the property rights incidental to that relation are entirely destroyed. *Barrett v. Failing*, 111 U. S. 523. Hence in this case the basis of the decree for permanent alimony is the loss of these property rights as well as the right to support. *Calame v. Calame*, 24 N. J. Eq. 440. Such a decree, like ordinary judgments, cannot subsequently be varied by the court unless at the time of divorce this power is conferred by statute or reserved in the final decree. *Walker v. Walker*, 155 N. Y. 77; *Howell v. Howell*, 104 Cal. 45. In the principal case, accordingly, it would seem that the wife's interest was vested, and therefore not subject to subsequent statutory restriction.

CONSTITUTIONAL LAW — EMINENT DOMAIN — RIGHTS OF LIGHT AND AIR INFRINGED BY ELEVATED TRAINS. — The defendant was directed by statute (N. Y. Laws, 1892, c. 339) to lay its tracks upon an elevated structure constructed for it by the state in place of an open subway which it had previously used. Both the subway and the viaduct were in a public street the fee of which belonged to the city. The plaintiff, an abutting owner, brought action for injury to his rights of light, air, and access, from the running of the elevated trains. *Held*, that the plaintiff has no cause of action. *Muhlkes v. N. Y. & Harlem R. R. Co.*, 173 N. Y. 549. Bartlett and Van, JJ., dissenting.

For a discussion of the principles involved, see 15 HARV. L. REV. 665.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LOTTERY TICKETS. — The plaintiff was indicted for causing lottery tickets to be carried from Texas into California in violation of the Act of Congress of 1895. He applied for a writ of *habeas corpus* on the ground that the Act is unconstitutional. *Held*, that the Act is constitutional. *Champion v. Ames*, 23 Sup. Ct. Rep. 321. See NOTES, p. 508.

CONSTITUTIONAL LAW — RESTRAINT OF INTERSTATE COMMERCE — INJUNCTION AGAINST BEEF TRUST. — A number of dealers, controlling sixty per cent of the interstate commerce in fresh meats in the United States, entered into an agreement restraining their bidding against each other for live stock, much of which was sent from other states than that in which the bidding was done. They further agreed to regulate among themselves the prices of meat to be sold in other states, and the charges for the cartage and delivery of it, and made arrangements with common carriers for unfair discrimination in rates. To a bill for a preliminary injunction, filed under the Sherman Anti-Trust Law, the defendants interposed a demurrer. *Held*, that the injunction should be granted. *United States v. Swift & Co.*, 35 Chi. L. News 236, decided Feb. 18, 1903, Circ. Ct., N. D. Ill.

It has been held that a mere combination of sugar refiners, with no agreement as to the dispositions of products, does not affect interstate commerce. *United States v. Knight Co.*, 156 U. S. 7. But when there is an agreement by which free competition in the sale of the products in the several states is restrained, as in the principal case, this is within the federal jurisdiction. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211. There are *dicta* that the Sherman Act applies to all contracts directly restraining inter-state commerce in any degree, whether the common law would regard them as unreasonable and void or not. See *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290. But no contract clearly legal at common law has yet been held to violate the Sherman Act, and there may be some doubt whether the courts would so hold. The Texas courts refuse to apply a similar local statute to a case of reasonable restraint. *Welch v. Phelps, etc., Windmill Co.*, 89 Tex. 653. Even at common law, however, a combination to regulate prices, as in the principal cases, by dealers largely controlling the market, is void. *Central Ohio Salt Co. v. Guthrie*, 35 Oh. St. 666.

CONSTITUTIONAL LAW — TAXATION — STATE INHERITANCE TAX ON NON-RESIDENT'S CHOSES IN ACTION. — The plaintiff's testator, a resident of Illinois, had a deposit in a New York bank and credits against New York citizens. An in-

heritance tax on their devolution was laid under a New York statute. (3 Rev. Stat. Codes & Gen. Laws, 3d ed. 1901, p. 3592.) *Held*, that the statute is constitutional. *Blackstone v. Miller*, 23 Sup. Ct. Rep. 277.

It is well settled that inheritance taxes on tangible chattels, both at the domicile of the owner and at their *situs*, are constitutional. *Callahan v. Woodbridge*, 171 Mass. 595; see *Eidman v. Martinez*, 184 U. S. 578, 586. If, then, the deposit and credits are to be regarded as chattels in New York, the decision is correct. A *dictum* in a former case considered all choses in action as taxable only at the domicile of the creditor. *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S. Sup. Ct.) 300. This *dictum* has, however, been questioned, and to-day the authority of the case appears to be reduced to the exact point decided, that the *situs* of specialty obligations is the *situs* of the instrument. See *New Orleans v. Stempel*, 175 U. S. 309, 319. Thus in garnishment proceedings a debt may be reached if there is jurisdiction over the debtor. *Chicago R. I. & P. R. R. Co. v. Sturm*, 174 U. S. 710. It has already been decided that a bank deposit of a non-resident is taxable at the *situs* of the bank. *New Orleans v. Stempel*, *supra*. The square statement in the principal case that jurisdiction over the debtor gives the right to tax a simple debt has at least the merit of furnishing a definite rule in a subject in which there has been much confusion. See 15 HARV. L. REV. 680.

CONTRACTS — OFFER AND ACCEPTANCE — STOPPAGE BY TELEGRAM OF LETTER OF ACCEPTANCE. — The person to whom an offer for the sale of land was made, mailed a letter of acceptance. Changing his mind, he recalled the letter by telegram. *Held*, that a binding contract was made by the mailing of the letter. *Scottish-American Mortg. Co. v. Davis*, 72 S. W. Rep. 217 (Tex., Civ. App.).

For a discussion of the principles involved, see 7 HARV. L. REV. 301.

CONTRACTS — PROMISE FOR BENEFIT OF THIRD PARTY — RELEASE BY PROMISEE. — The defendant contracted with X to pay the plaintiff a sum of money. X later released the defendant from his obligation, the plaintiff having had no notice of the original contract. *Held*, that the release is no bar to an action at law by the plaintiff on the contract. *Tweeddale v. Tweeddale*, 93 N. W. Rep. 440 (Wis.).

For a discussion of the principles involved, see 15 HARV. L. REV. 799.

CONTRACTS — REPUDIATION — DOUBTS OF SOLVENCY. — The plaintiff agreed to ship the defendant goods on June 1, payment to be made November 10. A part of the goods were so shipped, but the plaintiff, doubting the solvency of the defendant, refused to send the residue, although the defendant authorized shipment with draft attached to the bill of lading. In an action to recover the price of the goods sent, the defendant sought to set off his damages from non-receipt of the residue. *Held*, that instructions by the lower court allowing the plaintiff to repudiate the contract if he actually believed the defendant insolvent are erroneous. *Kavanaugh Mfg. Co. v. Rosen*, 92 N. W. Rep. 788 (Mich.).

In general, where the acts of one party to a contract have made it reasonably certain he will not perform, the other party is said to be excused from performance. See *Ziehen v. Smith*, 148 N. Y. 558. But just what acts are sufficient is not clearly settled. Actual insolvency may not be, for the trustee in bankruptcy has the right, and may desire, to perform the contract. *Gibson v. Carruthers*, 8 M. & W. 333. It would not seem unreasonable to throw on the trustee the burden of giving notice of intent to perform, although the law appears to be contrary. *Gibson v. Carruthers*, *supra*. If this be law with regard to actual bankruptcy, it would seem *a fortiori* that in the absence of any overt act of insolvency mere doubt, however reasonable, as to the financial condition of the other party would not justify refusal to perform. This is the decision in *Publishing Co. v. Butler*, 159 Mass. 517. It has been held in cases of actual insolvency that the seller may refuse to deliver except for cash, although the contract provides for delivery on credit. *Ex parte Chalmers*, L. R. 8 Ch. App. 289. But this seems never to have been extended to cases of mere belief in the buyer's insolvency.

CONTRACTS — STATUTE OF LIMITATIONS — ACKNOWLEDGMENT OF DEBT. — *Held*, that mere acknowledgment of indebtedness is insufficient to remove the bar of the statute of limitations. *Wood v. Merrietta*, 71 Pac. Rep. 579 (Kan.); *Lambert v. Doyle*, 43 S. E. Rep. 416 (Ga.). See NOTES, p. 517.

CORPORATIONS — INTERCHANGE OF STOCK — MUTUAL CONTROL. — An arrangement was made between two corporations through which, by the sale of the directors' personal shares in the first corporation and the issue of stock by the second, each corporation would own a majority of the stock of the other. It was then provided that the annual meetings of the first corporation should be held before those of the second, so that the directors of the former should always elect those of the latter, who in turn would

re-elect the old board of the former. Minority stockholders of the first corporation sue to restrain the execution of the plan. *Held*, that the injunction will be granted. *Robotham v. Prudential Ins. Co.*, 53 Atl. Rep. 842 (N. J., Ch.). See NOTES, p. 510.

**CORPORATIONS — RIGHT OF STOCKHOLDER TO SUE ON FRAUD.** — The president, who was also director of a corporation, sold property at a fraudulent price. A bill to recover the property was brought by a stockholder who alleged *inter alia* that before action by the directors or corporation was taken, the property would be removed beyond the jurisdiction of the court. The defendant demurred. *Held*, that the bill will lie. *Teris v. Hurd*, 79 (Ind., App. Ct.).

A stockholder clearly has no legal action against a director for mismanagement of corporate assets. *Smith v. Hurd*, 12 Met. (Mass.) 371. In equity, where damage of misconduct have not been executed but are merely threatened, an injunction will always be allowed. See 1 MOR. CORP. 2d ed. § 10. Where an action for past misconduct is sought, if the corporation has power to raise the stockholder's bill should show an attempt to move the directors. *Foss v. Harbottle*, 2 Hare 461. Though theoretically this is necessary when the act is *ultra vires*, even then the stockholder must move the corporation and its directors. *Hawes v. Oakland*, 10. However, a stockholder can show that a request would be nugatory if damage would ensue before the directors and corporation could act. An injunction is not required. *Brewer v. Boston Theatre*, 104 Mass. 378. Since the principal case seems to show that immediate action was necessary to prevent damage, the bill was properly supported.

**CRIMINAL LAW — PROCEDURE — PRIVATE EMPLOYMENT OF DETECTOR.** — *Held*, that an attorney employed and compensated to assist the prosecuting officer in a criminal trial. *State v. Tabor*, 7 (Mont.). See NOTES, p. 513.

**DAMAGES — DUTY OF UNITED STATES TO AVOID DAMAGE TO PRIVATE PROPERTY BY TREASURY NOTES BY GOVERNMENT AGENT.** — The superintendent of the mint received certain treasury notes. The notes, while in his custody, were destroyed by fire without his fault. Action was brought by the United States. *Held*, that the United States may recover the face value of the notes. *United States v. Bank of America*, 23 Sup. Ct. Rep. 279.

The decision involves the holding that the government need not compensate for avoid damages. In general, the law requires an injured party to make good his loss as far as possible, even by affirmative acts. *Pennsylvania R. R. Co. v. United States*, 104 Fed. Rep. 335; 1 SEDG. DAM. 8th ed. § 201 *et seq.* No grounds sufficiently strong to exempt the government from this duty, even if its legislative branch might be a prerequisite. Moreover, it is a material damage was ever sustained, especially since it is fairly argued that the so-called notes were in the United States, and that, consequently, the government has standing obligations. *Harmer v. Steele*, 4 Exch. Rep. 1. Under the decision, recovery should not be measured by the face value. It is true that whether actually in circulation as notes or not, would render them valuable to a *bona fide* purchaser. *Worcester County Bank v. Dorchester Bank*, 488. It might, therefore, be urged that public policy forbids the government from documents to raise any inquiry as to the method of loss. Where the facts are undisputed, such a rule seems more harsh than public policy.

**EQUITY — FRAUD WITHOUT DAMAGE — AVOIDANCE OF DEED.** — The plaintiff orally contracted with his neighbors not to sell his residence to anyone who would apply it to an objectionable use. The defendant desired to buy for such a use. On the refusal of the plaintiff to sell, the defendant employed an agent who obtained a deed by fraudulently representing that he was purchasing for an unobjectionable third person. Although the plaintiff had received his own price for the land, he brought a bill to have the deed set aside for the fraud. *Held*, that the deed will be set aside, although no damage to the plaintiff appeared. *Brett v. Cooney*, 53 Atl. Rep. 729 (Conn.). See NOTES, p. 509.

**EQUITY — INJUNCTIONS — STRIKERS IN PUBLIC SERVICE COMPANIES.** — A railroad company sought to restrain certain labor leaders from causing a peaceful strike among its employees. *Held*, that a temporary injunction will be granted. *Wabash R. R. Co. v. United Brotherhood of Carpenters and Joiners of America*, 104 Fed. Rep. 335.

*Co. v. Hannahan*, 56 Cent. L. J. 201, decided Mar. 3, 1903, Circ. Ct., E. D. No. [The injunction was dissolved April 1. — ED.] See NOTES, p. 518.

**EQUITY — SPECIFIC PERFORMANCE — MUTUALITY OF REMEDY.** — A wife who grounds for divorce from her husband and was living apart from him agreed to done his offence and to resume marital relations in consideration of his promise convey property to trustees for the benefit of their children. The wife returned to husband, and on his refusal to convey the property she brought a bill for specific formance. *Held*, since the agreement was executed on the wife's side, there is no of mutuality and specific performance will be decreed. *Moayon et al. v. Moayon*, S. W. Rep. 33 (Ky.).

For a discussion of the principles involved, see 16 HARV. L. REV. 72.

**INTERPRETATION OF STATUTES — TARIFF LAW — RIGHTS OF DEFRAUDED VENDOR.** — An act of Congress provides that if any owner, importer, consignee, agent or other person shall attempt to smuggle merchandise into the country, it shall be forfeited. (U. S. Comp. St. 1901, p. 1895.) Under this statute the government seized diamonds which a fraudulent purchaser was attempting to smuggle into the country. *Held*, that the defrauded vendor cannot reclaim the diamonds from the United States. *The Hundred and Eighty-one Diamonds v. United States*, 119 Fed. Rep. 556 (C. C. A., 10th Circ.).

The government cannot take free of the vendor's equity on the ground of being bona fide purchaser. *Cf. Easter v. Allen*, 90 Mass. 7; BENJ. SALES, 7th ed. § 433. Accordingly, the case must be supported, if at all, because it falls within the express words of the statute. Despite this fact, previous decisions would seem to show that the harsh result reached is unnecessary. Thus, under this statute, an innocent owner does not lose property smuggled into the country by his bailee. *United States v. 150 1/2 Lbs. of Celluloid*, 82 Fed. Rep. 627. Similarly, under the internal revenue laws, the government holds forfeited property subject to mechanic's liens. *United States v. Distillery, etc., of McCoy*, Fed. Cas. No. 14,964. The fact that a defrauded vendor's claim is merely equitable seems a distinction of little weight. Thus, when property was forfeited for the trustee's felony, the crown took subject to the trust. See LEWIN, TRUSTS, 9th ed. 265. It is true that in some cases, such as piracy, public policy demands that even an innocent owner should forfeit his property. *United States v. Brig Malek Adhel*, 2 How. (U. S. Sup. Ct.) 210. In the principal case, however, the demands of policy appear no stronger than in the case of property smuggled into the country by a bailee.

**JUDGMENTS — CONSTRUCTIVE NOTICE — IDEM SONANS.** — The defendant obtained judgment against one Sibert which was recorded under the name of Seibert. The plaintiff having bought land from Sibert, sought an injunction restraining the defendant from selling it on execution, claiming that he had no constructive notice of the defendant's judgment against Sibert. *Held*, that the names being *idem sonans* the injunction will not be granted. *Green v. Myers*, 72 S. W. Rep. 128 (Mo., Ct. App.).

It is generally held that if a mortgage be properly left for recording every one will be treated as having constructive notice, even though it was never actually recorded. *Rockmorton v. Price*, 28 Tex. 605. This seems to be based on the theory that the necessity of recording cuts down a mortgagee's common law rights. Accordingly, if one does his duty by leaving the mortgage for record, he should be protected. A judgment, on the other hand, must be so recorded that it will be discovered by any one making a reasonable search. *Etna, etc., Co. v. Hesser*, 77 Ia. 381; *Phillips v. McKaig*, Neb. 853. The explanation of this rule may be that the modern judgment lien on real estate has no existence as regards others than the judgment debtor unless they have had either constructive or actual notice of the judgment. *Cf. BLACK, JUDG.* 2nd ed. §§ 398, 404. Under the rule requiring substantial correctness in recording a judgment the principle of *idem sonans* is important only because similarity in sound tends to cause a search under different spellings. In the principal case, however, though the names were *idem sonans*, the difference in spelling was so likely to mislead that a more just result would probably have been attained by requiring greater exactness. *Cf. Davis v. Steeps*, 87 Wis. 472.

**MORTGAGE — EQUITABLE MORTGAGES — PRIORITIES.** — A trustee of land under a resulting trust in favor of the plaintiff mortgaged the premises. The plaintiff brought suit to enforce the trust. Before adjudication, the trustee obtained a loan to discharge the mortgage, promising to execute a new mortgage to the lender. The mortgage was discharged and the agreement was executed. Thereafter the trustee, to remove the mortgage last executed, borrowed money from the defendant in this suit, executing to



him a new mortgage. Later the preceding mortgage was discharged. In the pending suit, the trustee was ordered to convey the premises to the plaintiff, who now seeks to have the defendant's mortgage declared a cloud on his title. *Held*, that the plaintiff is entitled to the property free from the defendant's mortgage. *Bigelow v. Scott*, 33 So. Rep. 546 (Ala.).

The mortgages executed after suit was begun against the trustee were postponed to the plaintiff's equity under the doctrine of *lis pendens*. Nevertheless the court states that the holder of the intermediate mortgage was equitably entitled to priority. This result can be reached only on the ground that on the discharge of the earliest mortgage the legal title reverted to the trustee on a trust in favor of the man who advanced his money to remove the prior encumbrance. See *Eyre v. Burmester*, 10 H. L. Cas. 90; 15 HARV. L. REV. 863. It would seem that the defendant might likewise be entitled to a constructive trust of the equitable rights of the mortgagee whose debt was discharged with his advance. But since in the principal case the original equitable claimant has rightfully acquired the legal title, the decision of the court can be supported. *Peacock v. Burt*, 4 L. J. Ch. N. S. 33.

**MORTGAGES — FORFEITURE OF LIEN — TENDER OF PAYMENT AFTER DEFAULT.** — In Missouri, where the lien theory of mortgage obtains, a tender was made by the mortgagor of land after the day set for payment. *Held*, that this does not forfeit the mortgage lien, but stops the running of interest. *Knollenberg v. Nixon*, 72 S. W. Rep. 41 (Mo.).

In jurisdictions where the English view that the mortgagee has legal title prevails, a tender after default does not destroy the mortgagee's security. *Rowell v. Mitchell*, 68 Me. 21. Among the lien theory jurisdictions, however, the cases are squarely in conflict upon the effect of tender. Those which hold that the mortgage is thereby destroyed treat the right as an ordinary lien. *Kortwright v. Cady*, 21 N. Y. 343. The cases which reach the opposite result refuse, upon grounds of hardship, to follow out the lien theory. *Matthews v. Lindsay*, 20 Fla. 962. The principal case establishes this latter view in Missouri. This illustrates the tendency of the courts to cling to the common law conception of mortgage when a strict analogy to liens leads to apparently undesirable results. Other instances of this tendency are the survival of the mortgagee's rights when the debt is barred by a discharge in bankruptcy or by the statute of limitations. *Roberts v. Wood*, 38 Wis. 60; *Heyer v. Pruyss*, 7 Paige (N. Y., Ch.) 465. The decision that the tender stopped the running of interest is clearly sound. *Loomis v. Knox*, 60 Conn. 343.

**PROCEDURE — DIRECTING VERDICT — INCREDIBILITY OF EVIDENCE.** — In an action for libel the plaintiff, a "magnetic healer," introduced many witnesses who testified that they had been cured by his treatment. The trial judge refused to direct a verdict for the defendant. *Held*, that this is error since the jury could not reasonably believe witnesses swearing to what the court knew to be an impossibility. *Weltman v. Bishop*, 71 S. W. Rep. 167 (Mo.). See NOTES, p. 515.

**PROCEDURE — FEDERAL JURISDICTION — CORPORATION INCORPORATED BY TWO STATES.** — The defendant railroad company, originally incorporated in Virginia, had also been required to incorporate in Kentucky by filing a copy of its franchise. Suit was brought against it, as a local corporation, in a Kentucky court. *Held*, that the action cannot be removed to a federal court. *Davis' Admr. v. Chesapeake & O. R. R. Co.*, 70 S. W. Rep. 857 (Ky.).

Where a corporation, chartered by two or more states, was a party to a suit in one of them, it seems formerly to have been regarded, for the purposes of jurisdiction, as a citizen of the state in which the suit was brought. *Railway Company v. Whitton*, 13 Wall. (U. S. Sup. Ct.) 270, 283; see 12 HARV. L. REV. 350. The present view appears to be that a company once incorporated by a state, remains a citizen of that state, and cannot become a citizen of another state, merely by being declared by the latter a domestic corporation. *Louisville, etc., R. R. Co. v. Louisville Trust Co.*, 174 U. S. 552; *Calvert v. Southern R. R. Co.*, 41 S. E. Rep. 963 (S. C.). The result of the re-incorporation, however, is admittedly the formation of a new and distinct corporation. *Indianapolis, etc., Ry. Co. v. Vance*, 96 U. S. 450. The principal case draws the conclusion that either corporation may be chosen, to sue or to be sued, and that upon this choice depends the question of citizenship. But this would seem to be rather a question of fact as to which corporation is involved. Any determination of this would, as a general rule, be impracticable; while to leave the matter to the option of the plaintiff, as in the principal case, seems unjust. The qualification imposed by the federal rule, upon the theory of distinct corporate existence, is, therefore, thought to be sound.



**PROCEDURE — FEDERAL JURISDICTION — REMOVAL OF CAUSES.** — An act of Congress provides that where suit is brought in any state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States" upon showing local prejudice or influence. (U. S. Comp. St. 1901, p. 509.) The plaintiffs, citizens of Colorado, brought suit in a Colorado state court against the defendants, one a citizen of Colorado, the other a citizen of West Virginia. The latter made an application to remove the case. *Held*, that the cause cannot be removed, since the co-defendant of the applicant is a citizen of the same state as the plaintiffs. *Campbell et al. v. Milliken et al.*, 119 Fed. Rep. 982 (Circ. Ct., D. Col.).

The first part of the clause in question is copied from the local prejudice act of March 2, 1867. 14 Stat. 558. Under this act all parties on one side had to be citizens of different states from any party on the other side and had to unite in the petition for removal. *Sewing Machine Cases*, 18 Wall. (U. S. Sup. Ct.) 553. Most of the circuit courts have held, contrary to the principal case, that the present clause, as changed to "any defendant," requires merely the petitioning defendant to be of different citizenship. *Whelan v. New York, L. E. & W. R. R. Co.*, 35 Fed. Rep. 849; *contra*, *City of Terre Haute v. Evansville & T. H. R. R. Co.*, 106 Fed. Rep. 545. It would seem, however, that the effect of this change is to give the right of removal to any one of the defendants without altering the requirement that all the defendants be citizens of other states from any party plaintiff. The provision in the act that the other defendants may be remanded, if as to them the suit can be justly determined in the state court, may be explained as applicable to other defendants, although their citizenship differs from that of the parties plaintiff. Further, the view contrary to that of the principal case would allow the removal of suits not within the jurisdiction of the circuit courts originally. See U. S. Comp. St., 1901, p. 508; *Construction Co. v. Cane Creek*, 155 U. S. 283. This interpretation seems questionable. See *In Re Pennsylvania Co.*, 137 U. S. 451, 454; *Arkansas v. Kansas, etc., Coal Co.*, 183 U. S. 185, 188.

**PROPERTY — ACCRETION — EMERGENCE OF TOTALLY SUBMERGED LAND.** — In an action of ejectment it appeared that the plaintiff's lot was formerly separated from the Mississippi River by another lot. The plaintiff offered to prove that the latter had been gradually but totally submerged by the river, but had afterwards gradually emerged, forming the land in dispute. *Held*, that the evidence is irrelevant, since the plaintiff could acquire by accretion no title to the land beyond his original boundary. *Stockley v. Cissna*, 119 Fed. Rep. 812 (C. C. A., Sixth Circ.).

The principal case accords with the few authorities directly in point. *Ocean City Assn. v. Shriver*, 64 N. J. Law 550. On principle, however, the decision would seem unsound. The land in dispute was situated in Tennessee, and it is settled in this jurisdiction that the fee in the bed of navigable rivers is in the state. *Goodwin v. Thompson*, 15 Lea (Tenn.) 209. When land is gradually submerged by a river the former owner retains no rights in it, and the owner of the river bed acquires the absolute title. *Wallace v. Driver*, 61 Ark. 429; *Foster v. Wright*, L. R. 4 C. P. D. 438. In the principal case, therefore, while the land was submerged, the title was in the state and the owner's rights were extinguished. Being thus extinguished, it is difficult to see how they could revive. The plaintiff, on the other hand, has by the gradual and total submergence of the other lot become a riparian owner. *Welles v. Bailey*, 55 Conn. 292. It would seem, therefore, that he became entitled to the land, as it emerged, by the riparian owner's well recognized right to accretion. *Posey v. James*, 7 Lea (Tenn.) 98.

**PROPERTY — ESTATES — LEASE FOR LIFE DETERMINABLE AT WILL OF LESSEE.** — In an agreement to lease certain premises at a stated weekly rent the lessor promised not to give notice to quit so long as the lessee paid the rent regularly. *Held*, that this is an agreement for a lease for the lessee's life determinable at the lessee's option, and subject to the condition of regular payment of the rent. *Zimble v. Abrahams*, 19 T. L. R. 189 (Eng., C. A.).

Though the law bearing on this subject may be regarded as well settled, the case is interesting because of the unusual facts presented. An ordinary tenancy at will may be terminated by the lessor as well as the lessee. CO. LIT. 55 a; *Richardson v. Langridge*, 4 Taunt. 128. In the principal case, on the other hand, the parties have, in effect, expressly agreed that the estate shall be terminated only by the lessee. Since there is no reason for not giving effect to this provision, the lessee is thus entitled to an estate for life determinable at his option. See LEAKE, DIG. LAND LAW, 207. Such estates, though very unusual, have been recognized in both England and America. CO. LIT. 42 a; *Doe d. Warner v. Browne*, 8 East 165; *Warner v. Tanner*, 38 Oh. St. 118.

**PROPERTY — LIEN OF BOARDING-HOUSE KEEPER — PROPERTY NOT BELONGING TO BOARDER.** — A statute provides that the keepers of inns and boarding-houses shall have a lien on property brought upon their premises by guests; but that such lien shall not exist if the keeper of the inn or boarding-house has notice, when the property is brought, that it is not legally in the possession of the guest. (N. Y. Laws, 1897, c. 418, § 71.) A boarder brought on the premises of a boarding-house keeper property belonging to the plaintiff. The boarding-house keeper had no notice concerning the true ownership of the goods. *Held*, that the latter has no lien on the property for the debt incurred by the boarder. *Barnett v. Walker*, 39 N. Y. Misc. 323 (Sup. Ct.).

At common law an innkeeper had a lien on property brought by a guest even though the right of possession was in a third party, provided the innkeeper was unaware of this fact. *Robinson v. Walter*, 3 Bulst. 269; *Jones v. Morrill*, 42 Barb. (N. Y.) 623. A boarding-house keeper, on the other hand, had no lien. *Cochrane v. Schryer*, 12 Daly (N. Y.) 174. The present New York statute gives the same lien to both innkeepers and boarding-house keepers. According to the express terms of the statute this lien would seem to attach even to goods not belonging to the boarder. In reaching an opposite conclusion the court argues that the interpretation just suggested would make the statute inconsistent with the constitutional provision concerning due process of law. The same suggestion appears in *dicta* of two other courts. See *Wyckoff v. South Hotel Co.*, 24 Mo. App. 382; *McClain v. Williams*, 11 S. Dak. 227, 230. Since, however, in the case of innkeepers a lien of equal scope has been firmly established at common law, the statutory extension of that lien to boarding-house keepers would seem to be within the spirit as well as the letter of the constitution. *Cf. Munn v. Illinois*, 94 U. S. 113, 134; *Reilly v. Stephenson*, 62 Mich. 509.

**PROPERTY — RELIGIOUS SOCIETY — CONTROL OF PROPERTY ON DIVISION OF MEMBERSHIP.** — An unincorporated religious society was entitled to use certain property under a trust. A majority of this society seceded, incorporated as a church of a different denomination, and assumed control of the property. The minority, claiming to constitute the original society, seek to enjoin the majority from using the property. *Held*, that the minority are entitled to the property in question, and the majority will be enjoined. *Cape et al. v. Plymouth Congregational Church et al.*, 93 N. W. Rep. 449 (Wis.).

For a discussion of the principles involved, see 10 HARV. L. REV. 184; 12 *ibid.* 509.

**SURETYSHIP — VARIATION OF RISK — PRINCIPAL OBLIGATION PROVIDING FOR CHANGE.** — A building contract, upon which the defendant was surety, contained a provision that the employer might direct changes in the building as the work went on. He directed a material change, with the builder's consent. *Held*, that such a change is not included in the provisions of the contract, and that therefore the surety is discharged. *Erfurth et al. v. Stevenson*, 72 S. W. Rep. 49 (Ark.). See NOTES, p. 511.

**TORTS — CARE OF EXPLOSIVES — DELEGATION TO AGENT.** — An engineer who had been entrusted with railroad torpedoes by the defendant company placed one on the track and for his own amusement exploded it in order to frighten a child. The child was injured by a piece of the flying metal. *Held*, that the railroad company is responsible. *Euting v. Chicago & N. W. R. R. Co.*, 92 N. W. 358 (Wis.).

The court holds, as a matter of agency, that the servant's failure properly to exercise his duty of caring for a dangerous article rendered the company liable. But the decision would seem to rest upon a rule of torts rather than of agency. Unless the company itself owed the plaintiff a duty to see that the torpedoes were properly cared for, it is difficult to see how it can be responsible. In the absence of such a duty, certainly no principle of agency can make the company liable merely because of the employment of a servant and his failure to fulfil his duty to the company. Such a duty is imposed by the law of torts upon one who controls a dangerous instrumentality. That it should be a continuous duty resting upon him personally, and to be delegated to another only at his peril, seems reasonable, though this application of it may be harsh. There is considerable authority in accord. *Pittsburg, etc., R. R. Co. v. Shields*, 47 Oh. St. 387. See 15 HARV. L. REV. 406. One case, however, is directly *contra*. *Smith v. New York, etc., R. R. Co.*, 78 Hun (N. Y.) 524.

**TORTS — DUTY OF OCCUPIER OF LAND — BUSINESS VISITOR NOT ON THE LAND.** — The defendants had negligently permitted a shooting gallery to be operated in so faulty a manner, upon their exhibition grounds, that a bullet struck and killed the plaintiff's decedent, who was standing near by, waiting to enter the grounds. *Held*, that the deceased being a business visitor, the plaintiff can recover. *Thornton v. Maine State Agricultural Society*, 53 Atl. Rep. 979 (Me.). See NOTES, p. 516.

**TORTS — JOINT TORT FEASORS — RELEASE OF ONE WITH RESERVATION OF RIGHTS AGAINST OTHERS.** — Upon consideration of the payment of a sum of money the plaintiff gave to several of a number of joint tortfeasors an instrument purporting to release them absolutely, but reserving the plaintiff's rights against the other joint tortfeasors. The plaintiff subsequently brought an action against some of the joint tortfeasors not named in the instrument. *Held*, that this instrument is merely a covenant not to sue the joint tortfeasors named, and therefore does not discharge the others. *Gilbert v. Finch*, 173 N. Y. 455.

This decision is important as involving a question concerning which the decisions in New York are conflicting. See *Matthews v. Chicopee Mfg. Co.*, 3 Robt. (N. Y.) 711; *DeLong v. Curtis*, 35 Hun (N. Y.) 94; *Smith v. Consolidated Gas Co.*, 72 N. Y. Supp. 1084. It does not appear whether or not the instrument in the principal case was under seal. That a sealed release of one discharges all others jointly liable has long been recognized. See 6 BAC. ABR. 7th ed. 625, tit. Release (G). It is held, however, in England and in several American jurisdictions that, if the instrument reserves the right to pursue others jointly liable, it is merely a covenant not to sue and is not a release. *Price v. Barker*, 4 E. & B. 760; *Berry v. Gillis*, 17 N. H. 9. Though this construction is strained, it gives effect to the ultimate intention of the parties and therefore seems justifiable. Several American courts, however, have held that such a reservation is of no effect because repugnant to the release expressed. *Gunther v. Lee*, 45 Md. 60. A parol settlement purporting to effect a release is almost everywhere held not to discharge others jointly liable, unless the payment received was intended as a complete satisfaction of the claim. *Ellis v. Esson*, 50 Wis. 138; *contra*, *Mitchell v. Allen*, 25 Hun (N. Y.) 543; *Smith v. Consolidated Gas Co.*, *supra*. The New York decisions on this point at least would seem virtually overruled by the decision of the principal case.

**TORTS — MALICIOUS PROSECUTION — FORMER ACQUITTAL AS EVIDENCE OF LACK OF PROBABLE CAUSE.** — In an action for malicious prosecution the plaintiff introduced evidence of his acquittal in the criminal trial. *Held*, that such evidence cannot be considered for the purpose of establishing want of probable cause. *Bekke-land v. Lyons*, 72 S. W. Rep. 56 (Tex., Sup. Ct.).

As a condition to recovery the plaintiff must show a favorable termination of the prosecution instituted by the defendant. *O'Brien v. Barry*, 106 Mass. 300. See 14 HARV. L. REV. 223. There is some confusion as to whether the evidence of this fact may be considered for the additional purpose of establishing want of probable cause. Properly the question appears to be purely one of logical relevancy. From this point of view there are two classes of previous proceedings. In the first, fall those proceedings in which the issue is the probable guilt of the accused. Evidence of the favorable termination of such proceedings would seem relevant; for example, the discharge by a magistrate at a preliminary hearing. *Frost v. Holland*, 75 Me. 108; *contra*, *Israel v. Brooks*, 23 Ill. 575. The second class consists of those proceedings in which the probable guilt of the accused has not been in issue; for instance, where the prosecution has been abandoned. *Braveboy v. Cockfield*, 2 McMull. (S. C.) 270. The principal case would seem to fall within the latter class, for the acquittal tends to show only a failure to prove guilt beyond a reasonable doubt. The confusion in the cases arises because of a failure to distinguish between these two classes. The principal case is supported by the weight of authority. *Eastman v. Monnastes*, 32 Ore. 291; *contra*, *Christian v. Hanna*, 58 Mo. App. 37.

## BOOKS AND PERIODICALS.

**EMPLOYERS' LIABILITY FOR MALPRACTICE IN HOSPITALS FOR EMPLOYEES.** — It is a recognized exception to the doctrine of *respondeat superior* that charitable hospitals, private as well as public, are not liable to patients for injuries suffered at the hands of surgeons or nurses selected with due care for hospital service. *Joel v. Woman's Hospital*, 35 N. Y. Supp. 37. This freedom from liability has been extended to hospitals maintained by corporations for the treatment of their ill and injured employees. *Railway Co. v. Artist*, 60 Fed. Rep. 365. Whether the reasons for the exception satisfactorily explain the extension of it to such hospitals, is discussed in a recent number of the Central Law Journal. *The Non-Liability of Railroad Companies maintaining Hospitals for the Malpractice of Surgeons and the Negligence of Nurses therein*, by Wm. B. Morris, 56 Central L. J. 184 (March 6, 1903). The author holds the reason for the non-liability of a charitable institution to be that the burden of paying damages assessed against it ultimately falls on the public, since the public must care for patients whom the institution can no longer accommodate because its resources have been crippled. This reasoning, he urges, does not support the decisions relating to hospitals maintained by railroads, mining corporations, and the like.

Various theories, most of them unsatisfactory, have been suggested to explain the immunity of charitable corporations. It cannot rest on the fact that the corporation receives nothing in return for its treatment of the patient, for paying as well as non-paying patients are barred from recovery. *Ward v. St. Vincent's Hospital*, 50 N. Y. Supp. 466. Nor can it rest on the theory that the resources of a charitable institution are gifts in trust for charitable purposes and are not to be diverted from those purposes, for no distinction is taken between the endowment and the receipts from paying inmates. The true ground seems to be that suggested by the author and above referred to, namely, that there is no occasion to invoke the arbitrary doctrine of *respondeat superior* where the conduct of the *superior* is essentially charitable and the application of the doctrine must be expected to result in the lessening of his charitable efforts.

The author, however, fails to point out any clear distinction between the case of the ordinary charitable institution and that of the railroad hospital. His only implied distinction is that the element of selfishness is found commonly in the latter and rarely in the former. But it would seem that the mere incidental expectation of an indirect benefit is not enough to distinguish a non-charity from a charity. A working rule for all these cases should be based on something tangible, and should be uniform. It is doubtful if a more serviceable test can ever be applied than the one commonly adopted by the courts in both the classes of cases under discussion. If it appears that no direct profit is derived or expected from a hospital, by whomsoever maintained, then it is essentially a charity. It is reasonable to expect that a company would discontinue its hospital rather than assume responsibility for the mistakes therein of surgeons whose work brings the company no profit and is subject to no effective control by the company. But if the company derives an income from the maintenance of its hospitals, then the enterprise is no charity and the doctrine of *respondeat superior* should be applied. *Texas & Pacific Coal Co. v. Connaughton*, 20 Tex., Civ. App. 642. The question is certainly more difficult when a hospital is supported by deductions from wages. But even then, inasmuch as the institution is not maintained by the railroad for purposes of profit, it would seem to rank as a charitable, or at least as a co-operative, institution, and the railroad company, therefore, should be entitled to immunity.

**RIGHTS OF MORTGAGEE OF FIXTURES AGAINST MORTGAGEE OF LAND.** — In the recent case of *Reynolds v. Ashby*, 72 L. J. K. B. D. 51, the English Court of Appeal held that a prior mortgagee of the realty would be allowed to take machines affixed to the land under an agreement between the owner of the premises and the vendor of the machines that they should remain the property of the latter until paid for. In the earlier case of *Hobson v. Gorringe*, [1897] 1 Ch. 182, a subsequent mortgagee of the land was also preferred to the vendor of the machines. The weight of authority in this country is opposed to the case of *Reynolds v. Ashby*. *Campbell v. Munson*, 44 N. J. Eq. 244; *contra*, *Frankland v. Moulton*, 5 Wis. 1. The decision in *Hobson v. Gorringe* is in accord with the general American law. *Davenport v. Shants*, 73 Vt. 546; *contra*, *Ford v. Cobb*, 20 N. Y. 344.

In a recent article the author expresses his disagreement with both the English cases. *The Incidental Passing of Fixtures*, by John Indermaur, 25 L. Stud. J. 59 (March, 1903). In dealing with the case of *Hobson v. Gorringe*, Mr. Indermaur advances a novel idea. On account of the "common custom to let out machines and engines on the hire system," he would charge a subsequent encumbrancer of the land with constructive notice of the rights of the owner of the chattels. He justifies this by the following sentence: "As matters stand, I do not see how that particular branch of the trade is to go on, for a person . . . cannot in any way protect himself against the possibility of a subsequent mortgage." In order to appreciate the precise question, it would seem necessary to keep in mind that "*Quicquid plantatur solo, solo cedit*" is the rule of our law, and that the privileges of removing domestic and trade fixtures accorded to certain persons, such as leasehold-tenants and tenants for life, are exceptions to the rule, established from considerations of public policy. See *Elwes v. Maw*, 3 East 38. Thus the requirements of the early development of this country were held to justify an exception, refused in England, in favor of erections for agricultural purposes. *Van Ness v. Pacard*, 2 Pet. (U. S. Sup. Ct.) 137. Mr. Indermaur is really contending for the recognition of another exception in England, in favor of owners of machines and engines, and the correctness of his position would, therefore, seem to turn entirely on the accuracy of his estimate of the demands of public policy. While a presumption of notice such as he suggests would undoubtedly encourage the trade in these articles, it would, on the other hand, cast new and heavy burdens on purchasers and mortgagees of land. In view of the long-settled policy of the English law in favor of the transfer of titles to land unencumbered it would seem that there should be an unmistakable and very strong balance of convenience in favor of the vendor, in order to justify such radical action by the courts as Mr. Indermaur desires. Such balance of convenience, it may be thought, he fails to establish.

Furthermore, it is at least open to question whether such alleged hardship as the author seeks to remedy in England exists at all in this country. A mortgage on machines and engines might well be regarded, after they have been affixed to the land, as an encumbrance on the realty, and as such held entitled to be put on record with real mortgages. If this be true, it would appear that the owner of such articles has ample protection against a subsequent encumbrancer of the land. The existence of a right so to record seems never to have been established by actual decision, but it has been suggested in several cases. See *Trull v. Fuller*, 28 Me. 545. Some jurisdictions charge a subsequent encumbrancer of land with constructive notice, when the mortgage on fixtures is recorded simply as a chattel mortgage in the place provided for the filing of such mortgages. *Sowden v. Craig*, 26 Ia. 156. But this seems hardly within the spirit of our recording acts, and the weight of authority is against it. *Case Mfg. Co. v. Garven*, 45 Oh. St. 289.

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**GRATUITIES TO EMPLOYEES OF CORPORATIONS.** — The United States Steel Corporation has proposed a plan to stimulate its employees to more effective work. The main features are the purchase of its own stock at the market price, the sale of that stock to its employees at a reduction, and payment by the



employees by deductions from wages during a period of three years, the title to the stock apparently to be retained by the corporation till payment is completed. In order to encourage the employees to retain the stock it is further proposed to pay a bonus on each share held by an employee for five years, provided he obtains an official certificate of proper interest in the corporation's welfare. The legality of this measure has been questioned in a recent article. *Legal Aspect of the Plan of the U. S. Steel Corporation to Interest its Employees in its Stock*. Anon., 6 Law Notes (N. Y.) 221 (March, 1903).

The plan is considered *ultra vires* in that only employees having sufficient surplus income or funds to buy stock will be influenced by it. This objection, however, seems hardly sound. A corporation may under ordinary circumstances increase the pay of only a part of its employees. And, in general, so long as the benefit conferred on a given individual brings a commensurate return to the corporation, no legal objection made on the ground that similar benefits are not conferred on others should be sustained. The plan is considered also open to legal objection in that its effect is to suspend the voting power of a large block of stock until the payments are completed. By authorizing the use of corporate funds to buy up stock and keep it out of the hands of the opposition, the project helps existing officers to continue for three years the control of the existing majority. This danger however seems exaggerated, and in any event is the result, not of the plan, but of the corporation's established right, accorded by the liberal New Jersey statutes under which it was organized, to deal in its own shares. *Chapman v. Iron Clad Rheostat Co.*, 62 N. J. Law 497. The bonus, which is an essential part of the plan, is also considered objectionable because existing officers may require an employee, in order to get his bonus, to show that he voted "right" at the last election. This danger also seems slight, as the employee's vote is a two-edged weapon, and can be used against as well as by oppressive officials.

The question of how much a corporation may do to benefit its employees is interesting and not altogether settled. It has been held that a going corporation may give employees extra pay for past services in order to increase future effort. *Hampson v. Price's Co.*, 45 L. J. Eq. 437; *cf. Jones v. Morrison*, 31 Minn. 140. On the other hand, a corporation in the process of winding up cannot give property to employees, since no possible benefit can result to shareholders. *Hutton v. West Cork R. R. Co.*, 23 Ch. D. 654. It has been decided that a corporation may pension the family of a deceased employee for the sake of the effect on remaining employees. *Henderson v. Bank*, 40 Ch. D. 170; *cf. Beers v. N. Y. Life Ins. Co.*, 66 Hun (N. Y.) 75. A railroad may defray the medical expenses of one injured in its service. *T. W. & W. R. R. Co. v. Rodrigues*, 47 Ill. 188. A corporation may make contributions towards churches, schools, libraries, and free baths for the benefit of its employees. *Steinway v. Steinway*, 17 N. Y. Misc. 43. But such establishments cannot be carried on by the corporation itself, because the corporation would then be engaged in a business beyond its charter powers. *People v. Pullman Car Co.*, 175 Ill. 125. The test would seem to be whether the measure in question is adopted for the purpose of serving corporate ends and is reasonably calculated to promote those ends in a substantial manner. The question of what is a sufficient resulting benefit is one of degree, and courts should be slow to interfere with the discretion of directors. The motives of the Steel Corporation officials are not questioned, and the plan seems to promise a fair return. Under the test suggested, therefore, it might well be sanctioned.

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COLLIER ON BANKRUPTCY. Fourth Edition. The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898, as amended by the Act of February 5, 1903. By William H. Hotchkiss. Albany: Matthew Bender. 1903. pp. xlii, 984. 8vo.

Though this book is entitled Collier on Bankruptcy, Fourth Edition, the title does not describe the work. Mr. Collier prepared two editions of the book that



bears his name. The late James W. Eaton prepared the third edition and made many changes. Mr. Hotchkiss has rewritten the entire book, and, as the preface states, the result is a new work. This was perhaps inevitable, for, excellent as Mr. Collier's work was, it was written before there were enough decisions under the existing act to make possible an adequate presentation of the subject. But, though the rewriting was necessary, the propriety of calling the rewritten volume Collier on Bankruptcy may well be questioned.

It is but fair in criticising a book to bear in mind the aim of the author, and both the preface and the book itself make it plain that Mr. Hotchkiss aimed to write a handbook to assist in the daily routine of bankruptcy practice, rather than to make a scientific presentation of his subject or to discuss the doubtful and difficult questions which the law presents. In furtherance of his aim he has much enlarged the portion of the book devoted to forms, by preparing many forms supplementary to the official forms. The author's experience as a referee has fitted him for such work, and the new forms will doubtless be helpful and time-saving to practitioners.

It is but fair to premise also that a book on bankruptcy is, from the nature of the case, written and published hastily. Developments and changes occur much more rapidly in the law of bankruptcy than in other subjects, so that a text-book if it is to be useful must appear soon after the cases which it cites have been decided. The important amendments passed in February made it doubly desirable to bring the book before the public as soon as possible. Under these circumstances the writer may well "ask the indulgence of all who recognize that to err is human."

After all reasonable allowance has been made, however, the book cannot be called satisfactory. The style is frequently obscure from too great condensation or from lack of clear thinking. An extreme example taken from page 391 is to be found in the following sentence: "The former rule, though seeming more arbitrary, will in the long run prove more just; it pro-rates equity." The difficulty is increased by rather frequent misprints. In the fourth line on page 198, the substitution of "how" for "here" makes nonsense of the sentence. On page 388, note 48, the substitution of "ever" for "even" is more misleading because the sentence as it stands is grammatical. On page 492, a sentence reads: "Even if the judgment antedates the law, and the attachment is within the four months' period, it is dissolved." What this means is hard to conjecture. No exhaustive examination has been made by the reviewer, but the chance discovery of such slips makes it reasonably doubtful whether the printing of the citations is always accurate. Several mistakes in page references have been found to confirm the doubt. Another blemish, slight but annoying, is the too frequent citation of cases in the foot-notes with only the word *ante* or *supra* following the name of the case. As many cases are cited on almost every page, and as the seeker must often go back to the preceding page and sometimes farther to find the missing reference, the waste of time and patience is considerable.

The preface states: "The cases . . . are cited . . . with, it is hoped, such completeness as to make the work a table of cases on the law of bankruptcy, as well as a text book." This hope is not realized. The citation of federal decisions under the present act is indeed complete, but important decisions of state courts are not cited. The failure to notice the decision of *Train v. Marshall Paper Company*, 180 Mass. 513, is particularly striking. An amendment to Section 4 provides that the bankruptcy of a corporation shall not release its officers, directors, or stockholders from liability under the local law. Mr. Hotchkiss regards this as merely declaratory, but the Massachusetts court had decided that directors could not be charged under the Massachusetts law after the discharge of the corporation. Nor does Mr. Hotchkiss cite *Wood v. Vanderveer*, 55 N. Y. App. Div. 618, bearing upon the same point. Important decisions even of the United States Supreme Court under the last act are omitted, though still the governing decisions on important questions. Instances are *Fox v. Gardner*, 21 Wall. 475; *Boese v. King*, 108 U. S. 379; *Dushane v. Beall*, 161 U. S. 513.

It must be added that the author's treatment of difficult questions of bankruptcy law is inadequate, and his opinions, when expressed on such questions, are not of great value. S. W.

THE LAW OF REAL PROPERTY and Other Interests in Land. By Herbert Thorndike Tiffany. St. Paul: Keefe-Davidson Co. 1903. 2 vols. pp. xxxiii, 1-828; xv, 829-1589. 8vo.

It has been well said that "in the present state of legal learning, a chief need is for books on special topics, chosen with a view, not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of law. When such books have been written, it will then, for the first time, become possible to treat fully the great departments of the law, or even to construct a *corpus juris*." GRAY, RULE AGAINST PERPS., preface. How much the writer of the foregoing words has contributed through his own "books on special topics" to the possibility of treating fully one great department of the law, appears not only from Mr. Tiffany's own acknowledgment, but upon even a slight examination of the work before us.

Mr. Tiffany has produced a treatise upon the modern law of real property, but he has not neglected the earlier common law upon which the present system is based. To have omitted a consideration of the principles of that earlier law would have been to write a mere digest—and a very dry and unintelligible digest at that. On the other hand, the subject of the law of real property is so large that to examine and trace with minuteness its history and development would be far from serving the ends Mr. Tiffany has in view. Recent researches (especially the "History" of Pollock and Maitland) give to the author of the present day great advantages not within the reach of those who wrote before the publication of these latter-day discoveries. Mr. Tiffany has thus been enabled to treat the historical side simply, briefly, and consistently. His desire "to present, in moderate compass, the principles which govern the various branches of the law of land," and to produce a book which shall attract the student and also prove useful to the practising lawyer, seems to have been well accomplished. The student might wish that more space had been devoted to the discussion and weighing of opinions on contested questions, but this would be beyond the scope of the work.

It is often said that case-books are useless as tools to others than students who have studied them in their law-school courses. This statement can no longer be considered true as regards Professor Gray's Cases on Property and parts of Professor Ames's Cases on Trusts. A glance at the foot-notes on almost any page of Mr. Tiffany's book will show that the author has adopted the happy device of giving references to cases not only as they appear in the original reports, but also as they are reprinted in these case-books. Armed with Mr. Tiffany's work and with a few case-books, one might well feel that he had a small library of original authorities at his command.

The value of summaries and short statements of principles depends upon judicious selection and clearness and accuracy of expression. The student (and as a rule summaries are more useful to him than to the practitioner) will find the brief statements at the beginnings of chapters of much service in assisting him to a comprehensive view or review of the entire subject.

J. I. W.

A TREATISE ON EQUITY PLEADING AND PRACTICE, with Illustrative Forms and Precedents. By William Meade Fletcher, Professor of the Law of Equity Pleading and Practice in the Law School of Northwestern University. St. Paul: Keefe-Davidson Company. 1902. pp. xxxv, 1368. 8vo.

While the distinction between actions at law and suits in equity has been abolished in many of the states, in others the original forms of procedure, only slightly modified or simplified, are still in use, and in the federal courts throughout the country the English chancery system is in full force in all its

details. But in any jurisdiction, whatever the form of practice, there can be no clear understanding of the system of substantive equitable rights without an acquaintance with the system of forms and remedies by which these rights were enforced during the period of their origin and development, and by which their character was to so large an extent determined. The standard writers upon this subject have devoted themselves quite exclusively to equity pleading, paying little attention to that other closely allied topic, equity practice, which the present author considers at length. Many of the recent works have been either local in their character or given up almost entirely to the procedure in the federal courts. There is thus a real opportunity for a general modern treatise of the scope of the present book.

The author with considerable thoroughness and detail traces the entire course of proceedings in chancery, from the inception to the termination of the suit, according to the principles and procedure of the English chancery as they are administered in this country, uninfluenced by local modifications. Each stage of the several different phases that the suit may develop is carefully outlined, and illustrative forms or precedents are given at almost every step, though these forms are perhaps too commonly taken from local Illinois practice to be of very general usefulness. The chapter on parties is worthy of special mention, by way of example, as a well-analyzed treatment of a difficult and rather complicated subject. In the later part of the book the writer gives considerable attention to the different forms of bills, both original and supplemental, as they are classified from the point of view of procedure. Each different class of bills is treated in a separate chapter, and its essential characteristics are pointed out and distinguished. This part of the work appears to be of especial value.

A thorough collection of American citations and an appendix, containing the Ordinances of Chancellor Bacon and the rules of practice for the United States courts of equity, complete the volume. In this book Professor Fletcher has given us a well-planned, well-written, and practical treatise which deals with a complicated and highly developed subject in an interesting and thoughtful manner. It ought to prove a helpful assistant in the preparation and prosecution of suits in chancery in any jurisdiction.

W. H. H.

THE ENCYCLOPÆDIA OF EVIDENCE. Edited by Edgar W. Camp. Vol. I. Los Angeles: L. D. Powell Company. 1902. pp. 1020. 8vo.

At this time when encyclopædias of general law have amply justified themselves to the profession, it is interesting to note the appearance of the initial volume of an encyclopædia that is to confine itself to a single division of the law. The subject of Evidence, with which exclusively the new work is to deal, seems peculiarly deserving of this mode of treatment, since it extends so broadly into every field. The editor, Mr. Camp, has recognized the difficulty of handling the subject as a thing by itself, and he has therefore classified his material under the topics of the substantive law, indicating under each topic the various points that might possibly have an evidential bearing on it. He states in his preface that he has endeavored to include all the law of evidence — using the term in its broadest sense — and to exclude everything that would not generally be discussed in connection with that subject. To realize this latter object has been necessarily a delicate and trying task, and the work promises on completion to swell almost to the proportions of an encyclopædia of general law. Many topics are included which bear but slightly on Evidence. For example, under each crime are stated not only the several elements that constitute the crime, but also the various justifications and other defenses. However, as the prime requisite in a work of this kind is completeness, the presence of some seemingly irrelevant matter may well be pardoned.

Considering the purpose the work is designed to serve, it is wise that the editor has in general refrained from presenting original theories. Nor is it

much to be regretted that he has not ordinarily ventured any expressions of personal preference as between opposing views. But in some places in the volume there are manifest a defective analysis of subject-matter and an obscure arrangement of sub-topics, which must tend to impair the usefulness of the work for reference purposes. Thus true conflicts of authority are sometimes not clearly noted. For example, under the heading of Adverse Possession, no notice is taken of the conflict of authority on the question whether there is adverse possession when land is held by mistake. Instead there is merely a confusing attempt to distinguish cases which are in reality irreconcilable. See pp. 695 and 696, citing *French v. Pearce*, 8 Conn. 439, and *Grube v. Wells*, 34 Iowa, 148. Another fault of similar character is exemplified under the same topic. Reputation is treated in an apparently contradictory manner, first under "Proof of Open and Adverse Use" and then as a separate heading, and yet the fact of this double treatment is not indicated in either place.

Such minor defects, however, are much more than counterbalanced by many excellent features. The burden of proof is pointed out in all cases and all presumptions are carefully stated. The citations represent almost all jurisdictions, and are supplemented by pregnant quotations from leading cases. References are given not only to the state reports, but also to the National Reporter System and to the American Reports and Decisions. The cross-references are full and clear. The encyclopædia will fill a unique position among the works on Evidence, and can hardly fail to meet with ready appreciation from lawyers.

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A TREATISE ON THE LAW OF BANKS AND BANKING. By John T. Morse, Jr. Fourth edition. By Frank Parsons. Boston: Little, Brown, and Company. 1903. 2 vols. pp. cv, 1-743; 744-1490. 8vo.

Until the publication of the first edition of this work, in 1870, the law of banks and banking had not been developed beyond an unclassified mass of decisions. Mr. Morse's book not only collected the cases and arranged them under appropriate headings, but met the practical needs of bankers as well as lawyers by a concise but adequate statement of principles. The work in each of its three previous editions has been regarded by the courts as the standard authority in its field.

What development there has been in the law since the appearance of the third edition, in 1888, would not perhaps of itself warrant a further revision, especially as there are other later treatises. Nevertheless the fact that the editor has found it desirable to add as many new cases as were cited altogether in the original work, shows that the subject is even now by no means free from uncertainty and consequent litigation. The usefulness of the book has been further increased by the addition of citations to the National Reporter System, and by references to Minor's recent treatise on the "Conflict of Laws." The national banking acts since 1888 have also been added, together with such constructions as the courts have placed upon them. In these additions must be found the chief value of the present revision.

The text proper and the foot-notes remain unchanged, except for comparatively slight additions amounting to eighty-four pages in all in a work of fifteen hundred. As in the earlier editions, an outline of each chapter at its beginning and a complete index of the entire work make the subject-matter readily accessible.

It is perhaps a source of regret that in a work otherwise so complete the editor has not made a closer analysis of some doctrines which, while well established, are difficult to explain upon fundamental principles. The familiar rule, for instance, that a deposit by A in the name of B creates a debt from the bank to B, is dismissed with a bare statement, although, in jurisdictions where the sole beneficiary is not allowed to sue at law, B's right of action seems hard to explain, unless perhaps on the ground that the entry on the books of the bank constitutes an obligation in the nature of a specialty. Where there is a serious

conflict of decision, however, the question at issue is very thoroughly treated, a good example of this being the discussion, covering twenty-five pages, of the responsibility of a bank for the laches of its correspondent bank.

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**GERMANY'S CLAIMS UPON GERMAN-AMERICANS IN GERMANY.** A Discussion of German Military and other Laws which may affect German-Americans temporarily in Germany, together with some Comment upon existing Treaties. By Edward W. S. Tingle, formerly United States Consul, Brunswick, Germany. Philadelphia: T. & J. W. Johnson & Co. 1903. pp. xv, 121. 12mo.

This small volume should prove of considerable practical value. No questions arise more frequently or cause consuls of the United States greater trouble than those involving the rights, privileges, obligations, and liabilities of naturalized American citizens who return to their native lands. Though such questions arise in all countries, and would therefore warrant the preparation of a general treatise on the subject, the author has done well to confine himself to the questions that concern German-Americans. By so doing he has been able to give us a very handy pocket volume which both official and layman may conveniently and advantageously carry. At the same time he has omitted little necessary information; for, generally speaking, the questions affecting German-Americans are typical, and certainly because of the strict provisions of German military law they present as many difficulties as are likely to be encountered anywhere.

The plan of the book is good. The author first tells how American citizenship may be acquired; then, how far the German Empire recognizes such citizenship. After this he states the German military requirements and the effect they have on the position of a German-American who returns to the Empire. In Chapter VI. twelve possible cases in which difficulty may arise are put, and an excellent statement of the law applicable to those cases is added. The rest of the work tells what should be done by a German-American in preparation for and after his return to his native country; and also tells what consuls of the United States should do when called upon by naturalized citizens of the United States in difficulty. One chapter is devoted to a discussion of naturalization treaties, their interpretation and effect.

Though the plan is a good one, the execution cannot be so highly praised. The same information is, in several instances, given in different places; and sufficient emphasis is not gained by this repetition to compensate for the resulting confusion.

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**A TREATISE ON THE LAW OF THE MEASURE OF DAMAGES FOR PERSONAL INJURIES,** including Suggestions on Pleading, Evidence, and Province of Court and Jury, Applicable to the Trial of this Class of Cases. By George P. Voorheis. Norwalk, Ohio: The Laning Co. 1903. pp. lxxxvi, 577. 8vo.

The tendency towards specialization in the preparation of modern text-books is well illustrated by this work, which is devoted, as the title indicates, to a single branch of the general subject of Damages, hitherto customarily treated as an entirety. The book will prove useful in so far as any treatise on a branch of the law which presents no very grave difficulties can have a field of usefulness. Its most striking characteristic is its completeness. In fact, there are evidences of an effort on the author's part to expand a rather narrow subject so as to fill a volume, the size of which is better adapted to a work of broader scope. So far as this has led to the discussion of questions bearing only collaterally on the measure of damages, the result is an increase in the value of the book. Thus certain disputed rights of action — as, for example, for mere nervous shock and for mental anguish occasioned by delayed telegrams — are

considered at length in a helpful way. But the inclination to expand unduly the proportions of the book has led also to an extended and somewhat cumbersome method of treatment throughout.

The citations are very full, — in some instances objectionably so. For example, almost two hundred cases are cited in support of the simple proposition that diminished earning capacity is a recognized element of damage. An apparently novel feature of the book which should be of service in work before the appellate courts is a long list of jury awards which have been sustained as reasonable in amount.

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**A MANUAL OF MEDICAL JURISPRUDENCE, INSANITY, AND TOXICOLOGY.** By Henry C. Chapman, Professor of Institutes of Medicine and Medical Jurisprudence in the Jefferson Medical College of Philadelphia. Third edition 64 illustrations, 4 plates in colors. Philadelphia, New York, London: W. B. Saunders & Company. 1903. pp. 329. 8vo.

**THE BLOW FROM BEHIND, or Some Features of the Anti-Imperialistic Movement attending the War with Spain, together with a Consideration of our Philippine Policy.** By Fred C. Chamberlin. Boston: Lee and Shepard. 1903. pp. xiii, 147. 12mo.

**A CONCISE TREATISE ON CONTRACTS, upon a New Plan. The Fundamental Principles of the Subject introduced and briefly discussed.** By William T. Hughes. Chicago: Callaghan and Company. 1903. pp. 608. 8vo.

**A TEXT-BOOK OF LEGAL MEDICINE AND TOXICOLOGY.** Edited by Frederick Peterson and Walter S. Haines. Philadelphia, New York and London: W. B. Saunders & Co. 1903. In two volumes. Vol. I. pp. 715. 8vo.

**ANALYTICAL TABLES OF THE LAW OF EVIDENCE for Use with Stephen's Digest of the Law of Evidence.** By George M. Dallas and Henry Wolf Bicklé. Philadelphia: T. & J. W. Johnson & Co. 1903. pp. ix, 89. 8vo.

**COMPARATIVE SUMMARY AND INDEX OF LEGISLATION IN 1902.** New York State Library Bulletin 79. Edited by Robert H. Whitten. Albany: University of the State of New York. 1903. pp. 415-693. 8vo.

**CASES ON EQUITY PLEADING AND PRACTICE.** By Bradley M. Thompson, Professor of Law in the University of Michigan. Chicago: Callaghan & Co. 1903. pp. ix, 326. 8vo.

**CASES ON CRIMINAL LAW.** By Jerome C. Knowlton, Professor of Law in the University of Michigan. Chicago: Callaghan & Co. 1902. pp. xi, 397. 8vo.

**THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT.** By Louis L. Hammon. St. Paul: Keefe-Davidson Company. 1902. pp. xxx, 1233. 8vo.

**PROCEEDINGS OF THE NEBRASKA STATE BAR ASSOCIATION.** Vol. I., 1900-1902. Lincoln: Published by the Association. 1903. pp. 166. 8vo.



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## THE NORTHERN SECURITIES CASE AND THE SHERMAN ANTI-TRUST ACT.

**A**LTHOUGH the primary object of this article is to consider briefly the recent decision of the United States Circuit Court of Appeals for the eighth circuit, in the case of *United States v. Northern Securities Company and others*,<sup>1</sup> yet, as that decision is founded wholly upon the Sherman Anti-Trust Act,<sup>2</sup> it is proper to begin by saying whatever it is proposed to say in regard to that Act.

Considering the noise that it has made, the Sherman Anti-Trust Act is very brief. It comprises only eight short sections, and occupies only a little more than a page in the Supplement to the Revised Statutes of the United States.<sup>3</sup> Section 1 declares illegal "every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of trade or commerce among the several states, or with foreign nations"; and it further declares that "every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," and be punished accordingly. Section 2 declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire, with any other person or persons to monopolize any part of the trade or commerce among the several

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<sup>1</sup> 120 Fed. Rep. 721.

<sup>2</sup> 26 Statutes at Large, c. 647, p. 209.

<sup>3</sup> P. 762.

states or with foreign nations," shall be deemed guilty of a misdemeanor, and shall be punished accordingly. Section 3 is not material for the present purpose. Section 4 invests "the several circuit courts of the United States with jurisdiction to prevent and restrain violations of this act"; and makes it "the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." Sections 5 and 6 are not material for the present purpose. Section 7 declares that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and costs of suit including a reasonable attorney's fee." Section 8 will be stated further on.<sup>1</sup>

The first observation to be made upon this statute is that, regarded as a piece of substantive legislation, it simply, in terms, declares certain acts illegal and criminal, and accordingly by implication forbids them. Has it also the effect of making such acts civil torts? No, clearly not. A civil tort must necessarily be an injury to some person in respect to his personal rights or his rights of property.<sup>2</sup> The person injured by a civil tort may be a private person, a corporation, or the state. That the acts forbidden by this statute injure any one's personal rights will not be claimed; and it is also clear that they injure no one's rights of property, and least of all any rights of property belonging to the state. What are the acts which are forbidden? First, the entering into certain contracts, combinations, or conspiracies. What contracts, combinations, or conspiracies? Such as shall be in restraint of trade or commerce among the several states or with foreign nations, *i. e.*,

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<sup>1</sup> See *infra*, p. 546.

<sup>2</sup> In 13 HARV. L. REV. 537, 659, in an article entitled "Classification of Rights and Wrongs," I have divided all civil rights into the two classes of absolute rights and relative rights, and I have also divided absolute rights into personal rights and rights of property. If any reader should object to the terms "absolute" and "relative," he can substitute for them the terms "*in rem*" and "*in personam*." In a note at p. 546 of the same article, I have stated my reasons for preferring the former to the latter. In omitting all reference to relative rights in this place, I do not wish to be understood as asserting that a relative right can never be the subject of a tort, my object being merely to avoid embarrassing myself and my readers with that question unnecessarily

such as shall be entered into for that purpose, or with that object in view, or such as will produce, or have an inevitable tendency to produce, that effect. Secondly, the act or acts of monopolizing, or attempting to monopolize, or of combining or conspiring with any other person or persons to monopolize, any part of such trade or commerce. It is not necessary to deny that the act of carrying into effect a contract, combination, or conspiracy, or that the act or acts which may be consequential upon securing, or attempting to secure, or combining or conspiring with another person or other persons to secure a monopoly, may have the effect of injuring the rights of property of another person or other persons. And the authors of the statute appear to have thought such act or acts, or some of such acts, might have that effect.<sup>1</sup> But it is impossible that the mere act of entering into any contract, combination, or conspiracy, or the mere act of securing, or attempting to secure, or of combining or conspiring to secure, any monopoly should have the effect of injuring the property of any person whatever.

As, however, the Northern Securities Case is an action brought by the state, *i. e.*, by the United States, to "prevent and restrain" a violation of the act in question, it seems proper to inquire in what cases the state may maintain a suit in equity to prevent the commission of a civil tort. First, the state is an artificial person or body politic, and as such is the owner of property, and therefore it can, like other persons, whether natural or artificial, maintain suits in equity to prevent torts to its own property. It is not claimed, however, that any act or acts forbidden by this statute can constitute a tort to any property belonging to the United States. Secondly, it frequently happens that the state holds the title to property as representing the general public, the reason being that the general public, not being in law a person, can neither hold property in its own name nor sue in its own name, and hence it is represented by the state in both these respects. It follows, therefore, that the state has the same right to sue respecting property which it holds for the benefit of the general public that it has respecting property which it holds for its own benefit. The cases in which property is thus held by the state for the benefit of, and as representing, the general public, constitute two important classes, namely, first, cases of public highways of every description, including all railways, canals, navigable rivers, and tide-waters.

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<sup>1</sup> See section 7 of the Act, *supra*, p. 540. An injury to one's business is an injury to his property. See the article before referred to, 13 HARV. L. REV. pp. 669-670.

Sometimes such property consists of a mere right of way, in which cases of course it is incorporeal, and sometimes it includes the ownership of the soil. When it consists merely of a right of way, the ownership of the soil is generally in the owners of the adjoining land, as in the case of common highways or roads; when it includes the ownership of the soil, the soil, as well as the right of way, is generally vested in the state, as in the cases of navigable rivers and tide-waters, though, in the case of railways, the title to the soil is generally vested in the railway companies themselves.<sup>1</sup> The second class of cases in which property is held by the state for the benefit of, and as representing the general public, comprises all cases of property held upon public trusts, *i. e.*, all property devoted to religious, charitable, or other public uses, but not including property owned by the state and held for its own purposes. Property thus held upon public trusts is generally derived from the munificence of private persons, and the legal title to it is generally vested originally in trustees; but when such trustees consist of natural persons, it frequently becomes impossible, after the lapse of considerable time, to trace the legal title to such property, or ascertain in whom it resides. What is the function of the state in respect of property thus held upon public trusts? First, to represent in all cases the general public as the *cestuis que trust* of such property, and to see that the trustee, if any, performs his duty; secondly, if there is no trustee, or none can be found, it is the duty of the state to supply the want of a trustee, and thus protect the property against strangers.

With property of this last description it will be admitted that the statute in question has nothing to do; and though it has been held<sup>2</sup> that the statute has to do with railways, that is not because the acts forbidden by it are liable to be committed against railways, but because they are liable to be committed by railway companies. In short, if the statute extends to railways, it is not because Congress was seeking to protect railways, regarded as public highways, against the acts of tort-feasors, but because it was seeking to protect the general public against any attempts by railway companies to establish and maintain unreasonable rates. But such attempts, even if successful, would not constitute civil torts, nor could they ever ripen into torts, which could be restrained and prevented at the suit of the United States, as rep-

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<sup>1</sup> As to this first class of cases, see *In re Debs*, 158 U. S. 564, 586-593.

<sup>2</sup> *United States v. Trans-Missouri Freight Ass.*, 166 U. S. 290.

resenting the general public. Thus, if two railway companies should enter into a contract with each other to advance the rates on their respective lines beyond what would be reasonable, no right, either public or private, would be infringed by such contract. Nor would the carrying out of such contract, by establishing and maintaining unreasonable rates, be an infringement of any right, public or private. If, however, any person should require either of those railway companies to carry his goods, and the latter should refuse to do so, except at the unreasonable rates thus established, it would thus infringe the personal right<sup>1</sup> of such person to have his goods carried at a reasonable rate, and accordingly such person could maintain an action for damages; but the United States could maintain no action except for a refusal to carry its own goods at a reasonable rate.

Upon the whole, therefore, it is clear that the Sherman Anti-Trust Act is a criminal statute pure and simple, *i. e.*, that it simply declares certain acts to be crimes, and provides for their punishment. It also confers upon courts of equity jurisdiction to "prevent and restrain" the commission of such acts, and thus furnishes an instance of a statute which confers upon courts of equity jurisdiction to restrain and prevent the commission of crimes.<sup>2</sup> Had not the Act conferred this jurisdiction in express terms, it is plain that no court of equity could have entertained any suit founded upon the Act.<sup>3</sup>

The second observation to be made upon the statute is that section 2 has no application to railways or railway companies. There is not, indeed, in the Act itself a single word which can lead any one to think that its authors had either railways or railway companies at all in their contemplation; and the only argument in favor of the view that the first section of the Act extends to railways or railway companies is founded wholly upon the com-

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<sup>1</sup> See Note on p. 554.

<sup>2</sup> See Mr. Mack's article on "The Revival of Criminal Equity," 16 HARV. L. REV. 389-403.

<sup>3</sup> In *In re Debs*, 158 U. S. 564, 593, BREWER, J., in delivering the unanimous opinion of the court, said: "It is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law."

prehensiveness of the following words in that section, namely, "*all* contracts, combinations, and conspiracies."<sup>1</sup> As, however, sections 1 and 2 are wholly independent of each other, the words just quoted have no tendency to show that the two sections are coextensive in their application; and the extent of the application of section 2 must depend upon considerations applicable to that section alone. Section 2 declares that every person who shall do any of certain specified acts shall be deemed guilty of a misdemeanor; and if the acts so specified can be committed by railway companies as such, the words "every person" are sufficient to include such companies.<sup>2</sup> Can then railway companies commit the acts specified in section 2? That question depends upon the meaning of the words "any part of the trade or commerce among the several states, or with foreign nations." Undoubtedly, railways are by far the most important of all instruments of inland trade and commerce, but an instrument by means of which a thing is done, even though it be indispensable, is not the thing itself. Railways are also public highways, and as such are subject to the control of the state. Moreover, when used for the carriage of goods, the subjects of trade and commerce, from one state into or through another state, or other states, they become subject to the control of the United States Trade and commerce, however, actually consist in buying and selling, though they may, perhaps, be also said to include certain necessary incidents of most buying and selling, as, for example, the carriage of goods bought and sold from the seller to the buyer. Thus, the buyer and seller must always take such carriage into consideration as sometimes causing an important item of expense incident to the buying and selling, and they should of course have a clear understanding as to whether such expense is to fall upon the buyer or the seller. It is only, however, in its relation to the buyer and seller of goods that the carriage of such goods can be said to be an incident of the buying and selling of them. In its relation to the carrier, who performs the service merely for hire, the carriage of goods bought and sold has no more to do with the buying and selling of them than any other service performed for hire upon them or in relation to them, whether with a view to their sale or as an immediate consequence of their sale. It has

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<sup>1</sup> See *United States v. Trans-Missouri Freight Ass.*, *supra*.

<sup>2</sup> See section 8 of the Act *infra*, p. 546.



been held<sup>1</sup> that even so important a thing as the manufacture of goods by their owner, though done solely with a view to selling them, is not trade or commerce in such goods; and this would be true even of the manufacture of goods by a seller of them, under an order from the buyer. Nor is it at all material whether the service of carrying goods for hire be performed in one state only or in more than one; if it is not trade and commerce when performed in one state only, it is not interstate trade and commerce when performed in more than one state.

As, therefore, the only thing that a railway company can monopolize is the carriage of goods and passengers for hire, and as such carriage does not constitute trade or commerce, it follows that railway companies are not within section 2 of the Act. The only monopoly which section 2 forbids is a monopoly of the goods which constitute the subjects of trade and commerce, so far as the trade and commerce in such goods is subject to the control of the United States. This explains the fact that section 2 forbids the monopoly of any part of such trade or commerce. To forbid a monopoly by a railway company of the carriage of any part of the goods carried by it would be absurd, as every railway company necessarily has a monopoly of the carriage of by far the greater part of the goods carried by it, and no railway company could live without such monopoly. It is only at what are known as competing points that a "shipper" of goods has any choice as to the railway by which he shall "ship" them.

The next question is: what are the acts which section 1 of the statute forbids? Or, to put the question in the concrete, and, at the same time, limit it to the Northern Securities Case, did it forbid the organization of the Northern Securities Company for the purpose of acquiring and holding a majority of the shares in the Northern Pacific and Great Northern Railroad Companies, and the carrying out of that purpose through the acquisition by that company of such shares? In answering this question in the affirmative, the Circuit Court of Appeals professed to follow three decisions of the Supreme Court, made in cases<sup>2</sup> arising upon the same statute, the Circuit Court holding that the Northern Securities Case could not be distinguished from those three cases, and hence was governed by them. Was the court right in thus hold-

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<sup>1</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1.

<sup>2</sup> *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290; *U. S. v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211.

ing? No, it seems not. In two<sup>1</sup> of those three cases, several railway companies had associated themselves together, under articles of agreement, for the purpose of regulating the rates to be charged for the transportation of goods on their respective lines or systems, and making such rates stable and uniform; and, in the other case,<sup>2</sup> several manufacturers of a certain class of goods had associated themselves together, under articles of agreement, for the purpose of regulating the prices at which goods manufactured by them respectively should be sold. In the Northern Securities Case, on the other hand, there is only one person concerned, namely, the Northern Securities Company. Nor is it material that that company is only an artificial person, *i. e.*, a corporation. It was created by the State of New Jersey, has always remained in that state, and all the acts complained of were done in that state; and therefore the validity and lawfulness of those acts depend wholly upon the laws of New Jersey, unless they would have been made invalid and unlawful by the laws of the United States, if done by a natural person. Indeed, it is wholly immaterial to the United States whether any act done within the limits of a state is done by a natural or an artificial person, *i. e.*, the validity and lawfulness of the act, under the laws of the United States, can never depend upon whether the person doing it belonged to the one or the other of these two classes of persons. Accordingly, the Sherman Anti-Trust Act does not contain the slightest allusion to artificial persons, except in the seventh and eighth sections, and those two sections show conclusively that the Act intended to make no distinction between natural and artificial persons; for section 7 declares as stated *supra*,<sup>3</sup> while section 8 declares that "the word 'person' or 'persons,' whenever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Would it, then, have been a violation of the Act for any natural person to have acquired and owned, either a majority of the shares in the Northern Pacific and Great Northern Railroad Companies respectively, or all of them, or any number less than all? The court does not claim that it would have been, and that it would

<sup>1</sup> U. S. v. Trans-Missouri Freight Association and U. S. v. Joint Traffic Association.

<sup>2</sup> Addyston Pipe and Steel Co. v. U. S.

<sup>3</sup> P. 540.

Not have been is a proposition too plain for argument; for no person can contract, or combine, or conspire with himself.

The court, therefore, clearly regarded it as indispensable to show that several persons were concerned in doing the acts which it adjudges unlawful, and it attempted to do so by going behind the Northern Securities Company, and treating the acts done by it as done by the natural persons who promoted and procured the organization of the company, and who caused it to acquire the shares in question; and accordingly the court likens the acquisition of the shares in question by the Northern Securities Company, not to their acquisition by a single natural person on his own account, but to their acquisition by a "trust."<sup>1</sup> But it is a complete answer to all this to say, first, that the acts adjudged unlawful were done, in point of law, by the Northern Securities Company itself, and by no one else; secondly, that in doing those acts, the Northern Securities Company was as completely within the law as any natural person would have been in doing the same acts; thirdly, that the procuring, inducing, or causing, of another person, whether natural or artificial, to do a lawful act, cannot possibly constitute an unlawful combination or conspiracy.

The next question is whether, assuming that the acts complained of violated the statute, the relief given in the Northern Securities Case is authorized by the Sherman Anti-Trust Act, or warranted by any principle of equity. That it is not warranted by any principle of equity, if not authorized by the Act, is plain from what has been already said, namely, that equity would have had no jurisdiction of the case, but for section 4 of the Act. Was then the relief given authorized by section 4? No, clearly not. What did that section authorize courts of equity to do? Simply to "prevent and restrain" the carrying into effect of any contract, combination, or conspiracy which the Act makes unlawful. In order to apply this section of the Act intelligently, it is necessary to distinguish between those contracts, combinations, and conspiracies, on the one hand, which create certain relations between the parties to them which are expected to continue, substantially unchanged, so long as the contract, combination, or conspiracy remains in force, and to which, therefore, the legal distinction between things executory and things executed is inapplicable, or as to which the distinction is merely a distinction between the future and the past, —

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<sup>1</sup> 120 Fed. Rep. 721, 725.

between things already done, and things remaining to be done, and, on the other hand, contracts, combinations, and conspiracies, the carrying into effect of which will put an end to the relations between the parties to them which such contracts, combinations, and conspiracies originally created, but will result in the immediate creation of new and different relations, and as to which, therefore, the distinction between things executory and things executed is vital. To the former class belong the three cases already referred to, while the Northern Securities Case belongs to the latter class. In the former class of cases a court of equity may "prevent and restrain" the further carrying into effect of the contract, combination, or conspiracy so long as such contract, combination, or conspiracy remains in force. In other words, it will never be too late for the court to give relief as to the future until all occasion for relief is past. In the latter class of cases, on the other hand, relief can be given by way of restraint or prevention only so long as the contract, combination, or conspiracy remains executory. It is to be observed, however, that a contract, combination, or conspiracy may have two stages, both of which are executory, namely, a first stage, in which nothing has yet been executed, and a second stage, which, while it is the result of an execution of the first stage, is itself executory in turn; and, when such is the case, it must first be ascertained whether the statute forbids the execution of the first stage, or of the second stage, or of each stage; for if it forbids the execution of the first stage only, an injunction can be granted only so long as that stage remains executory, while, if it forbids the execution of the second stage only, an injunction can be granted only after the execution of the first stage and before the execution of the second stage. If, on the other hand, the statute forbids the execution of each stage, an injunction granted any time before the execution of the second stage will be in time. The Northern Securities Case furnishes a good illustration of these distinctions, assuming, of course, that the case is within the statute. The first stage of that case was the organization of the Northern Securities Company, while its second stage was the acquisition by that company of the shares of the Northern Pacific and Great Northern Railroad Companies. Whether the statute forbade the execution of each stage, if it forbade the execution of either, it seems not material to inquire, as no injunction was granted till long after the execution of the second stage, at least to the extent of the acquisition of more than a majority of the shares of each of the two

railway companies, and, therefore, long after it had ceased to be possible to grant any relief by way of prevention, except against the acquisition of any more of such shares.

The conclusion, therefore, is, that the court was never authorized to give any other than negative relief in the Northern Securities Case, *i. e.*, relief by way of prevention, even assuming that the case comes within the statute, and that the time had long gone by when any such relief could be given that would do the United States any good or the defendants much harm; and yet the court has managed to make a decree which has been said in print more than once to be the most important decree that was ever made. Whether that is so or not depends upon the meaning attached to the word "important." That a more iniquitous decree was ever made may be asserted with much confidence. What, then, is the nature and character of this decree? First, while it is, in its terms, purely negative, it forbids what is not forbidden by the statute, either directly or indirectly, and what the court, therefore, had no authority to forbid; secondly, the negative relief was given solely with a view to compelling affirmative action to be taken by the defendants which the court well knew it had no means of compelling directly. That is to say, the Northern Securities Company having issued its own shares in exchange for shares in the Northern Pacific and Great Northern Railroad Companies, and the statute having, as the courts say, thus been violated, and it being too late to give relief by way of prevention, the court sought to compel the parties to the exchange to undo what had been done by re-exchanging the shares in the Northern Securities Company for the shares in the railway companies, and thus to accomplish the same object that might have been accomplished by giving negative relief, if it had not been too late to give such relief; and the court attempted to accomplish that object by declaring that the Northern Securities Company should never vote or receive dividends on any of the shares held by it in the Northern Pacific and Great Northern Railroad Companies; and as these shares constitute substantially the only assets of the Northern Securities Company, this was equivalent to declaring that the latter company should never pay dividends on its own shares issued in exchange for the shares in the two railway companies. Undoubtedly, the court expected its decree speedily to bring the parties to terms, especially as the only persons affected by the decree were the Northern Securities Company and its shareholders, and as the

latter had, therefore, everything in their own hands. The court, accordingly, expected the restraints of the decree to be only of short duration, and it therefore intimated to the parties that they could free themselves from those restraints at any moment by making the re-exchange before referred to. These considerations do not, however, affect the character of the decree in the slightest degree. It is still true that the decree is a final one, and that the restraints imposed by it are absolute and unqualified; and the only question, therefore, is whether, as they stand, they are legal or illegal.

I. The United States does not claim to have the slightest right or interest in the shares in question, either on its own account or as representing the general public, nor does it in any way impeach or question the title of the Northern Securities Company to those shares. It does, indeed, claim that the acquisition of those shares was forbidden by the Sherman Anti-Trust Act, and that the act of acquiring them was, therefore, a criminal offense; but that is no impeachment of the title of the Northern Securities Company. The mere fact that the acquisition of property is made criminal furnishes no ground for impeaching the title of the person acquiring it. The only way in which the title of a person in possession of property can be impeached is by the assertion of a title to that property in opposition to his, and, in the case of the shares in question, there is confessedly no person who does or can assert a title to them in opposition to the Northern Securities Company, and, for that reason, as has been shown, the acquisition of those shares by that company did not, and could not, constitute a civil tort. But even when property is acquired by one person from another by means of a civil tort, the latter can never impeach the title of the former, unless the tort be a statutory one, and the statute expressly declares that no title shall be acquired by means of such tort.<sup>1</sup> Equity may, indeed, sometimes give relief in such cases, but only by rescinding the transaction, *i. e.*, by compelling the tort-feasor to reconvey to the person injured what he has acquired from him, on receiving from the latter what he gave him in exchange.

II. Such then being the title of the Northern Securities Company to the shares in question, the decree declares that it shall

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<sup>1</sup> Notable instances of such statutes will be found in 9 Anne, c. 14, against gaming, 12 Anne, statute 2, c. 16, against usury, and in the New York Statute of 1837 against usury. Laws of 1837, c. 430, p. 486



never enjoy those shares except by alienating them. Moreover, so long as that company chooses to retain those shares, the decree produces two extraordinary results, namely, first, that two continental lines of railway are turned over to the control of a small minority<sup>1</sup> of their shareholders; secondly, that the bulk of the earnings of the same railways, applicable to the payment of dividends, is absolutely tied up.<sup>2</sup>

What then can be said in support of such a decree? The court claims that it is authorized by the statute, apparently on the theory that Congress must have intended to authorize any proceeding which the court should find necessary to carry out the purposes of the statute.<sup>3</sup> But the answer to that is that a lawgiver is supposed to mean only what he says, and that Congress, in conferring authority upon courts of justice in the statute in question, has used language so clear and explicit as to leave no room for doubt as to its meaning, and as to preclude any extension of its meaning by interpretation or construction. Whether, therefore, the statute itself would be valid, if it authorized such a decree, it is not necessary to inquire.

Can anything else be said in support of the decree? Only that the end justifies the means. Perhaps the court would not admit that it proceeded upon this theory, but it is the only theory or view that can be advanced in support of the decree, unless the court

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<sup>1</sup> Namely, a minority of about twenty-four per cent in the case of the Great Northern Railroad Company, and of about four per cent in the case of the Northern Pacific Railroad Company. See 120 Fed. Rep. 724.

<sup>2</sup> How serious a thing this is will be appreciated, when it is stated that the Northern Securities Company now holds upwards of 1,500,000 shares in the Northern Pacific Railroad Company, and upwards of 940,000 shares in the Great Northern Railroad Company, and that the former company is now paying dividends at the rate of 6 per cent, while the latter is paying at the rate of 7 per cent. It will thus be seen that the decree will tie up nearly sixteen millions of dollars annually.

<sup>3</sup> THAYER, J., delivering the opinion of the court, says (120 Fed. Rep. 730): "It would be a novel, not to say absurd, interpretation of the Anti-trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation."

was right in thinking the decree was authorized by the statute, and, if the court was right in so thinking, then it is the only theory that can be advanced in justification of the statute. It is to be hoped that no lawgiver or court of justice ever proceeded knowingly and consciously upon a theory so destructive of every principle of justice.

But what shall be said of the end for the attainment of which the court was tempted to make so extraordinary a decree? It is undoubtedly a common thing for a court of equity to rescind a transaction between two persons which has been procured by the fraud of one of them, *i. e.*, to compel the tort-feasor to restore what he has received from the person defrauded, upon the latter's restoring to him what he gave in exchange, equity thus restoring both parties to the situation that they were in when the fraudulent transaction took place. It is scarcely necessary to say, however, that such a rescission can be made by a court of equity only upon the application of the person defrauded, he being the only person who is entitled to a rescission as well as, presumably, the only person who desires one. Can a court of equity, then, rescind a transaction between two persons, in which neither has been defrauded by the other, neither has injured the other, which neither wishes to have rescinded, and which neither will join the other in rescinding, except upon compulsion? To do so would necessarily imply a suit in which both parties to the transaction to be rescinded are made defendants, and some person who is a stranger to that transaction is plaintiff, and the only plausible reason that could be given for such a suit would be that the plaintiff is the state, and is seeking to punish a crime, *i. e.*, is seeking to compel the defendants to undo a thing which has been done by them, and the doing of which has been made a crime. Such is the suit in question;<sup>1</sup> and hence we have the extraordinary spectacle of a court of equity attempting, indirectly, and by means of an illegal decree, to compel defendants, as the only means of escaping the penalties of that decree, to do what the court had no power to compel them to do, and that too by way of inflicting a punishment

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<sup>1</sup> The reader will observe that section 4 of the Act does not say in whose name the suits which it directs shall be brought, but it directs them to be brought by a District Attorney of the United States, and it is only on behalf of the United States that the statute could direct suits to be brought, or a District Attorney to bring suits; and, as the statute furnishes no ground upon which a civil suit could be directed, of course the suits directed must be criminal.

for a crime. It seems scarcely necessary to add that the statute lends not the slightest countenance to such a proceeding.

The conclusion, therefore, is that the decree is a mere act of arbitrary power and utterly without justification or excuse. Lest, however, some reader should be apprehensive that its reversal would leave the public without protection against the "rapacity of railway monopolists," it seems proper to say that a powerful argument in support of the view that no part of the statute extends to railways or railway companies is derived from the fact that there was no call for such an act respecting them; that the only way in which railways can do an injury to the general public is by charging unreasonable rates for the services which they render, and that for such an injury the state already had an incomparably better remedy than any which the Sherman Anti-Trust Act can furnish, in its unquestioned power to regulate and control railway rates; that the principle of unlimited competition, as a means of keeping prices within reasonable limits, is not only inapplicable to railways, but, if applied to them, produces the greatest evils to the public as well as to the railways; that, if the state itself should undertake the duty of rendering to the public the services which are rendered by railway companies, every one would agree that its monopoly of such service should be complete and absolute; and when the state delegates to railway companies the right to render these services, and imposes upon them the corresponding duties it becomes the function of the state, first, to see that those companies faithfully perform their duties to the public, and, secondly, to give them, so far as it is practicable, the same protection against competition that it would itself enjoy, namely, by permitting no railways to be constructed except under its own special authority, and by authorizing the construction of new railways only where those already existing are unable, or fail, to perform all the service which the public requires; that the ideal railway system would be a system comprising all the railways in any given state, and of course controlled by a single authority, namely, either by the direct authority of the state, or by the direct authority of those by whom the system is owned, acting, however, under such rules and regulations as the state from time to time sees fit to make; and such in particular is the system for which those who desire to see state ownership of railways should work; that, as has been already seen, the only competition possible among railway companies is at competing points, and that the only effect upon the public

of unrestrained competition at all competing points is, first, to give those who "ship" their goods at competing points lower rates than they are in justice entitled to receive, and, secondly, to give those unreasonably low rates at the expense of those who can "ship" their goods only at non-competing points; and, finally, that it was such competition as that just mentioned that caused the only great and widespread dissatisfaction with railway rates that ever existed in this country, and that the dissatisfaction thus caused was so great and widespread as to lead to the enactment of the Interstate Commerce Act.<sup>1</sup>

*C. C. Langdell.*

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<sup>1</sup> 24 Statutes at Large, c. 104, p. 379.

*Note to p. 543.* — It was through an inadvertence that I described in the text the right of a person to have his goods carried by a railway company at a reasonable rate as a "personal" right. The state imposes upon every railway company the duty of carrying the goods of every person at a reasonable rate, and hence the right of every person to have his goods so carried is a relative right, and a refusal to perform the correlative duty is a violation of the right, and constitutes a negative tort. See 13 HARV. L. REV. 537-8, 539, 542-6, 659-61.

## LIMITATIONS UPON THE RIGHT OF WITHDRAWAL FROM PUBLIC EMPLOYMENT.

THE law of "public callings," although a very interesting branch of legal knowledge, and one rapidly assuming great importance in connection with the development of our economic system, has received only partial and fragmentary treatment from legal writers, and still furnishes a fruitful field for investigation. The present writer has already published certain opinions and authorities on the question of what constitutes a public calling.<sup>1</sup> In this article it is proposed to discuss one of the incidents of such employments,—the duty, imposed by the law under certain circumstances, of continuing to carry on a public calling.

It is undoubtedly true—and allusion is made to it in the opinion in *Munn v. Illinois*<sup>2</sup>—that where a public right in property or to service arises from a voluntary holding out of the property or the service to the public, it may ordinarily be terminated by a withdrawal of the offer of public use. One who owns a hotel may go out of the hotel business and use the building for his private dwelling; or a wagoner who is a common carrier may cease to be a common carrier, and resume exclusive use of his vehicles for his domestic purposes.

This rule is, however, obviously subject to the qualification that one cannot abruptly, and without reasonable opportunity to the public to change their own affairs accordingly, so terminate his relations with the public. For example, an innkeeper could not lawfully put a sudden end to his business in the middle of a winter night, nor a common carrier suddenly leave his occupation and abandon his passengers or freight by the roadside; and it would seem to be true that the character of property, in a given instance, may be such, or the dealings with the public may have become of such character and so intricate, that it may not be possible for a very long period, and perhaps may not be possible at all, to withdraw the property from the public right.

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<sup>1</sup> In a pamphlet entitled "The Coal Mines and the Public," published by the J. B. Millet Co., Boston, and an article entitled "A Word More about the Coal Mines" in the "Green Bag" for December, 1902.

<sup>2</sup> 94 U. S. 113.

If this suggestion is thought to go a long way, it may be answered that it goes no further than the accepted doctrines of custom and dedication. The broad proposition that a man, by encouraging the public to rely upon a certain use of his property, may find himself unable to withdraw it from that use, is already firmly established in the law. Furthermore, the theory of permanency of public rights in cases of the particular kind under discussion, that is, cases of public employment, is not now suggested for the first time. For example, in the case of *Allnut v. Inglis*,<sup>1</sup> Lord Ellenborough suggested, as at least admitting of considerable doubt, the question whether a public warehouse owner might not be bound to continue indefinitely the existing application of his property to a public use.

It cannot be said, however, that the law has as yet taken definite shape on the broad question thus presented. But when certain additional factors are introduced, as when the public servant in question stands in a peculiar relation to the state through the enjoyment of governmental privileges, or when the withdrawal proposed is temporary or incomplete, authority is less meagre. Before proceeding to examine these situations in detail, it will be well to consider a few general principles.

The public employment about which the largest number of cases has arisen, with a correspondingly complete elaboration by successive decisions of its legal relations to the public, is that of the common carrier. It is there accordingly that we shall find the most plentiful illustrations of the principles applicable to the present discussion. It may be admitted at the outset that one of the incidents attaching to the business of the common carrier, as well as to that of the innkeeper, does not apply equally to all other employments of the class under discussion. This incident, belonging to the carrier or the innkeeper in his capacity as a bailee, is his liability as an insurer for goods in his custody. Since there is such an incident, not common to all public callings, we must first inquire what is meant when we say that a telegraph company or a grain elevator company is engaged in a public employment, in the same sense as a common carrier, and subject like the latter to the incidents of such employment.

Underlying the entire law of carriers, from the Year Books down to the present day, are three fundamental duties: first, to carry for

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<sup>1</sup> 12 East, 527, 540. See also remark of BAYLEY, J., in same case, at p. 544.



any member of the public at all times and not merely when the carrier is so disposed; second, to give to each applicant exactly the same terms and accommodations as are given to every other under the same circumstances; third, to perform the services of the carrier's employment at reasonable rates. These are the duties alluded to in almost every definition of a common carrier, and they are reiterated in countless cases.<sup>1</sup>

The same duties attach to the calling of the innkeeper, and they are equally familiar to every student of that branch of the law. These are the duties which attach by virtue of the public nature of the calling, and they are the characteristics common to the whole class of public employments.<sup>2</sup>

It is true that a large proportion of the decided cases which go to support this last proposition are concerned with two of the three duties mentioned, — the duty to serve without discrimination, and the duty to serve at reasonable rates. This is to be expected, since for obvious business reasons a person or corporation engaged in a public calling seldom refuses altogether to serve the public, while instances in which rates are claimed to be excessive, or in which a single individual is refused service while others are served, are naturally much more frequent. Again, cases in which a single individual is refused may generally be rested either upon the general duty to serve the public or upon the duty to serve all alike, or upon both grounds; and in such cases there is a natural tendency to choose the second ground for a practical reason. The inquiry exactly how far the general duty to serve the public extends is a broad one, furnishing considerable field for discussion, and the precise limits of that duty in a particular case cannot always be laid down beyond possibility of dispute; while the duty to serve all alike involves a single simple rule, well established and beyond dispute, and the plaintiff who rests his case on that duty has only to show that others have been granted what was refused to him. When he has shown that fact, it follows that, whether or not he could, as a member of the public, have insisted on that

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<sup>1</sup> See for example *Chitty & Temple, Carriers*, 23; 2 *Kent, Com.* §§ 598, 599; *Hutchinson, Carriers*, 2nd ed., § 57 a; *Chicago, etc., Ry. Co. v. People*, 56 Ill. 365, 378; *Louisville, etc., R. R. Co. v. Wilson*, 119 Ind. 352, 358.

<sup>2</sup> *State v. Nebraska Tel. Co.*, 17 Neb. 126; *People v. Hudson River Tel. Co.*, 19 Abb. N. C. 466; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399; *State v. Portland Natural Gas & Oil Co.*, 153 Ind. 483; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 659; *Allnut v. Inglis*, 12 East, 527; *Griffin v. Goldsboro Water Co.*, 112 N. C. 206. See also *Munn v. Illinois*, 94 U. S. 113.

particular service, he can insist upon it if and so long as it is rendered to others. Clearly, then, when discrimination can be shown, it furnishes the shortest and simplest ground on which to ground the case.

No one, however, who reads carefully the law of public callings as it is laid down in text-books and decisions can fail to see that the general duty to serve the public lies at the bottom of the whole subject. It is assumed by those writers who do not explicitly state it, and is explicitly stated frequently enough to put it beyond doubt. There are numerous decisions expressly rested upon that duty, and there are numerous elaborate *dicta* of able judges which state the law clearly and unmistakably ;<sup>1</sup> while no case has been found in which the existence of such a general duty as an incident of public callings has been questioned or denied. Even in such of the reported decisions as deal more or less with a statute obligation, — such as certain of the cases relating to gas, water, telephone, and telegraph companies, — the right of a particular plaintiff to the company's services has been repeatedly based on the broad ground of a general duty to serve the public, and has repeatedly been said to rest on exactly the same principles as the right to the services of a common carrier.<sup>2</sup>

The duty to serve all, and at all times, is of course subject to some qualifications. Thus, a carrier or an innkeeper may not be liable to one whom he is unable to serve, where his facilities have been exhausted by other applicants. Again, payment may generally be required in advance. But these and some other similar qualifications which might be mentioned, only make the rule a reasonable one without in any degree weakening it. The obligation of the public servant extends, generally speaking, as far as the capacity of his property, but it can extend even so far as to require him to procure and devote to the public use a larger quantity of property than he has chosen to provide. The courts have not yet gone so far as to require a railroad company to provide cars for any possible quantity of traffic ; but it is its duty, and the duty has frequently been enforced, to have sufficient cars for all traffic reasonably to be anticipated ; and upon notice from an intending shipper the carrier, if without cars, must make reasonable effort to secure them.<sup>3</sup>

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<sup>1</sup> See authorities above cited.

<sup>2</sup> See cases above cited.

<sup>3</sup> Hutchinson, Carriers, 2nd ed., § 292 and cases cited.

Even where it is physically impossible to serve all applicants adequately, it does not follow that any may be refused altogether. The extent to which the duty may be carried is illustrated by a striking case recently decided by the Supreme Court of Indiana.<sup>1</sup> A natural gas company was sued by a resident of the locality which the company supplied, the object of the suit being to compel the company to supply the plaintiff with gas. It was shown in defense that the supply of natural gas available to the company was limited, and was no more than sufficient for the needs of the customers already being supplied. The court held the defense insufficient, and gave judgment for the plaintiff, although the logical effect of the decision would be to require the company in a not improbable event to supply many more persons than the quantity of gas available would properly accommodate. The decision was rested upon the general principle that a company engaged in such a public employment must serve all applicants within the territory of its operation. It was pointed out that a contrary decision might enable those persons who, through priority of application, had first entered into relation with the company, to secure light and fuel of such a kind and on such terms as would give them an unfair advantage over their business rivals. The policy of the law to secure to all the public an equal share of commodities of public importance — a policy carried out in a vast number of cases of many kinds — was the underlying ground of the decision.

The general duty to serve all the public at all times has been emphasized because it lies at the foundation of the present subject. It is evidently only another way of expressing a part of that duty, to say that the service must be regular, and not, so long as the public calling is carried on, subject to interruptions and irregularities either at the caprice of the managers of the business, or as a result of any other cause not constituting a legal excuse.

Before proceeding to our conclusions from the principles that have been stated, two distinctions, already suggested, must be pointed out. The first is the distinction between an individual or partnership engaged in a public employment, an ordinary corporation in a similar employment, and a corporation enjoying a delegation of governmental authority, as for example the right of eminent domain. The second distinction is that between a definite and permanent withdrawal from business, and a temporary or partial withdrawal.

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<sup>1</sup> State, *ex rel.* Wood v. Consumers' Gas Trust Co., 61 N. E. Rep. 674.

Naturally enough, it is in the case of corporations exercising *quasi*-governmental powers that the law has gone farthest. A corporation chartered by the state incurs by the acceptance of its charter certain obligations to the state in relation to the performance of its functions. In theory, at least, a corporation is chartered only because it is for the public interest that it shall be chartered, and it therefore undertakes a general duty to carry on the business for which it is created. If it fails to do so its charter may be revoked in proceedings at the suit of the state. These principles obviously have a peculiar operation in the case of a corporation chartered to perform a public service; and if there is added a delegation of governmental authority, as by a grant of the power of eminent domain, it is natural to find that the right of the state to insist on the continued performance of the public duties assumed by the corporation, is both positive and extensive.

Accordingly we find in the case of such corporations a respectable amount of authority for the proposition that, so long as the service is needed by the public, the corporation is bound to continue business, provided this can be done without financial loss. The point is by no means settled, but the tendency may be said to be in this direction. The cases are collected in a recent number of the REVIEW.<sup>1</sup>

These cases relate to the right of public service companies to withdraw definitely and permanently from business. As to a similar right on the part of individuals or partnerships, or ordinary corporations, engaged in public callings, authority is meagre. The sentence already quoted from Lord Ellenborough, and somewhat similar suggestions in other cases, together with the analogy of the authorities referred to just above, suggest the possible development of the law. It may at least be said with some confidence that wherever the necessities of the public are seriously involved, reasonable notice and reasonable time for adjustment must be given. Beyond this much will depend on the economic situation in connection with which the question shall first require a settlement.

Turning now to the question of partial or temporary withdrawal, we shall find less difficulty in reaching definite conclusions. An innkeeper could not be said, in the strict sense, to withdraw from the business because he chose to close his inn for a week and enjoy a vacation. A railroad company does not withdraw from the

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<sup>1</sup> 15 HARV. L. REV. 363.

business when it is unable to operate its trains because its men have struck and it refuses to grant their demands. At the present moment we are not considering the question of adequate excuse for such temporary stoppage; but it must be obvious that the recognition of an innkeeper's or a carrier's right absolutely to abandon the business of an innkeeper or a carrier is in no way inconsistent with a rule requiring the innkeeper or carrier, so long as, speaking broadly, he is in the business, to conduct it regularly and continuously.

The situation in which this question will most often be presented, and in which its decision will involve the most important consequences, is that which arises in case of a strike. The existence of the duty of regular service, so long as there is no genuine withdrawal from the business, will hardly be questioned, and the discussion must therefore center about the question of excuse. Here again the cases are most numerous in which corporations enjoying special franchise privileges are involved. But it will hardly be doubted that the duty of regular service applies with equal force to all persons engaged in public callings, and unless some special reason can be shown in the nature of the excuse presented, it would seem that the same rules and qualifications ought to apply in all cases. Certain things undoubtedly will excuse one engaged in a public calling from full performance of his usual duties. The familiar examples given in all the text books are "acts of God, and of the public enemy." There are, however, other possible excuses. An unforeseeable rush of traffic has been held to excuse a carrier for delay in shipping goods, and the violent acts of a mob, which could not by any reasonable means have been prevented, have been held to have the same effect. But there seems no basis in the law for saying that a strike as such is any excuse. Thus in *Blackstock v. New York & E. R. R. Co.*,<sup>1</sup> it was held that a strike of the carrier's servants was no defense in an action for damages resulting from delay in carriage. The same doctrine was affirmed in *Hall v. Penn. R. R. Co.*<sup>2</sup>

In *People v. New York Cen. & H. R. R. Co.*,<sup>3</sup> a petition for mandamus was brought against the defendant company, based on the fact that, owing to a strike on the part of its employees, the

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<sup>1</sup> 20 N. Y. 48.

<sup>2</sup> 1 Fed. Rep. 226. See also *Chicago, etc., Ry. Co. v. Burlington, etc., Ry. Co.*, 34 Fed. Rep. 481, 484; *Pittsburg, etc., R. R. Co. v. Hazen*, 84 Ill. 36.

<sup>3</sup> 28 Hun 543.

defendant had for some time forwarded only a small proportion of the freight regularly tendered for carriage. In holding that the company had thus violated its public duties, the court rested its decision in the first instance upon the duties undertaken by the corporation in accepting a charter from the state, the charter being regarded both as imposing a public trust upon the corporation, and as a contract between the corporation and the state. But the case illustrates very well the fact that the obligations which such a charter is construed to impose are derived fundamentally from the general duties of the carrier's employment. Thus, the petition which was filed alleged that the railroad company, since a certain date, had

*"substantially refused to discharge its duties as a common carrier, and had, to a material degree, suspended the exercise of its franchises by refusing to take freight which had been offered at its stations in the city of New York for transportation, at the usual rates and upon the usual terms."*

In commenting upon the petition the court says:

"These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of a carrier."

And again:

"We are not able to perceive the difficulties that embarrassed the court below us to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done."

Thus it appears that the duties enforced in that case were exactly the same duties which are enforced in any suit by a private citizen against a common carrier for refusal to receive and carry the plaintiff's goods.

On the question whether the strike afforded any excuse to the carrier, the court said:

"The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained



of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus.

"These facts reduce the question to this : Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law."

In accordance with this opinion the writ of mandamus was issued. An exactly similar case, resulting in the same decision, was *Loader v. Brooklyn Heights R. R. Co.*,<sup>1</sup> decided in 1895, in which the court, after stating that it was the duty of the company to run cars enough to accommodate the public, proceeded as follows:

"It may not lawfully cease to perform that duty for even one hour. The directors of a private business company may, actuated by private greed or motives of private gain, stop business, and refuse to employ labor at all, unless labor come down to their conditions, however distressing. But the directors of a railroad company may not do the like. They are not merely accountable to stockholders. They are accountable to the public first, and to their stockholders second. They have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it."

The authorities thus far cited have related to peaceable strikes. It may be thought, however, that when the element of mob violence is added the case takes on a different aspect. Let us see if this is so.

In the first place the cases in which a public service company has been held to be excused for failure in its ordinary duties by the existence of mob violence will be found on examination to turn very sharply on the question of causation. Thus in *Hall v. Penn. R. R. Co.*, cited above, the suit was brought for the destruction of certain goods in transit. The court affirmed the proposition of the plaintiff that a peaceable strike would not excuse the company, but finding that the goods had been burned by a mob, held that the

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<sup>1</sup> 35 N. Y. Supp. 996.

action of the mob and not the strike was the sole cause of the damage; that is, that the strike alone would not, so far as appeared, have resulted in the damage complained of. Again, in *Geismer v. L. S. & M. S. R. R. Co.*,<sup>1</sup> suit was brought for damage to live stock, caused by delay in transportation. It appeared that, during the progress of a strike, the strikers or their sympathizers had taken possession of the company's engines, and carried off parts of them, and by other acts of violence had made it impossible for the company to operate its trains. In both these cases, and in others of the same sort, the defendant was held to be excused; but in all such cases it will be found that the particular damage in question was, under the evidence, the result of mob violence alone, and would not have resulted simply from the strike.

In most strikes extensive enough to affect the public injuriously, there is a certain element of violence. But it is almost never the case that violence alone causes the cessation of business. At the outset it usually plays very little part, and it is comparatively seldom, if ever, the case that lawlessness goes so far as to render it absolutely impossible to carry on the business. As has been shown, it does not excuse the employer that the men demand unreasonable wages. Neither would it excuse the employer if men refused to work out of sympathy with the strikers. It is only actual prevention by violence, or its equivalent in actual bodily intimidation of men otherwise ready to work, that the cases show to be an excuse.

Again it is to be noted that in the cases cited on the question of violence and lawlessness, the proceeding was an action to recover damages for past injuries. But the question of the duty of one engaged in a public calling in case of a strike may be raised in another way. When a stoppage of business is threatened as a result of a strike, those entitled to be served by the employer by virtue of the public nature of his calling, may seek to prevent the threatened damage to their interests by mandamus, injunction, or receivership proceedings. The first of these procedures is illustrated by some of the cases already cited. The second would be an obviously appropriate remedy wherever its enforcement would not be too complicated.<sup>2</sup> The third might, it would seem, be properly invoked whenever it becomes evident that those in charge of the

<sup>1</sup> 102 N. Y. 563.

<sup>2</sup> See *Chicago, etc., Ry. Co. v. Burlington, etc., Ry. Co.*, 34 Fed. Rep. 481.

business are not able to cope with the difficulties which the conduct of their employees has produced. It is not the purpose of this article to argue for the applicability of any particular form of procedure. On the question of receivership the views of the present writer have already been presented to the public.<sup>1</sup> The point here to be made is that when business of a public character is tied up or likely to be tied up by a strike, and the remedy sought by members of the public is preventive rather than compensative, the question of excuse takes on a somewhat different character.

One who has rights in certain property, of which he has not received the benefit in the past, through difficulties with which those in charge of the property have been unable to cope, may be entitled to such action by the courts as will enable him to secure those rights in the future, although he may not have a cause of action for all the damage that he has suffered up to the time of his application to the court. The familiar cases of incompetent management of corporations, unaccompanied by such fraud or negligence as would give a right of action for past losses, furnish a sufficient example. The very effective action of the courts in the Debs case, and in other proceedings at the same time, demonstrated the ability of the United States courts to deal through preventive remedies with conditions of violence which the owners of the property and the local authorities could not meet. It might easily be true that a court would sustain an application for preventive relief, when one who waited till after the damage was done could not recover all he had lost.

Our examples have been drawn chiefly from the business of the railroads, because it is there that cases have most often arisen. But no reason appears why the same principles are not applicable to all public callings; and it is necessary only to read the case of *Munn v. Illinois*,<sup>2</sup> to realize both how many employments are included in that class, and how readily the law will enlarge it as public needs require. It is easy to see, therefore, that the views which the writer has presented are, if correct, of the utmost importance in their bearing on the conflict constantly waging between capital and labor. If it be thought that the recognition of such principles as have been pointed out puts into the hands of the workmen so powerful a club as to risk upsetting altogether the

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<sup>1</sup> In the pamphlet above referred to. See also *Fishback v. Citizens' St. Ry. Co.*, 4 Nat. Corp. Rep. 9 (Ind. Super. Ct.).

<sup>2</sup> 94 U. S. 113.

economic balance, it may be said in reply that the law has also much to say to strikers and labor organizations. It has already been more than once effectively invoked against them, when they have gone too far, and it is doubtful if they have yet felt the full strength of its hand.

It is to be hoped that the possibilities of legal interference in the case of strikes, both as those possibilities affect the employer and as they affect the workman, may never require to be fully developed. There is a constantly increasing tendency on both sides to meet each other fairly and in a businesslike spirit. Where such a spirit is lacking, there is much to be hoped from the force of public opinion. The great coal strike of last summer, while it brought forcibly home to the people the possibilities of public danger in the struggle of labor and capital, demonstrated also how effectively the people may make their voices heard. But while the tendency to businesslike negotiation, — with the immense saving to both parties which it accomplishes, — and the force of public opinion, may go far toward preventing serious public loss as a result of labor controversies, it is still important for two reasons to realize how the law on the question stands. In the first place public opinion speaks more readily and firmly when it is assured of a basis for its demands in law as well as in justice. Some such assurance, indefinite but real, pervaded the discussion last fall which finally culminated in the settlement of the coal strike. Again, when negotiation and public opinion fail, as they sometimes do, and employers and workmen prepare to fight their battle out, it is infinitely better that they and the public should resort to the law, and come to realize its full power, rather than wait for starvation or violence to bring about a settlement. At least in the case of public employments there can be little doubt that the law is capable of protecting the public from the serious loss which may result while employer and laborer are settling their quarrel.

*H. W. Chaplin.*

## RETREAT FROM A MURDEROUS ASSAULT.

"A TRUE man, who is without fault, is not obliged to fly from an assailant who by violence or surprise maliciously seeks to take his life, or to do him enormous bodily harm." These words of the Supreme Court of Ohio were quoted with approval and followed by the Supreme Court of the United States in 1895.<sup>1</sup> Two years later the same court sustained a charge to the effect that "if he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm . . . he may lawfully kill the assailant . . . provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power."<sup>2</sup> These contradictory views, thus held by the same court at substantially the same time, have pretty evenly divided the jurisdictions in this country. One view must be right; both cannot be. But to choose with confidence the right theory requires a somewhat careful examination of the history of the law of self-defense.

## I.

It is almost an axiom of our law that a man who kills another in the necessary defense of himself from death or even from serious bodily harm is excused, and must be acquitted when indicted.<sup>3</sup> So reasonable is this doctrine, that a modern lawyer can hardly believe that homicide in self-defense was once a capital offense; and a modern judge is greatly tempted to misread the old authorities in the light of modern notions of justice, and to misapply old precedents to the damage of contemporary administration of law. Yet the right to kill in self-defense was slowly established, and is a doctrine of modern rather than of medieval law.

From the beginning of the jurisdiction of the king's courts over crime to the reign of Edward I. homicide could be justified only

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<sup>1</sup> *Beard v. U. S.*, 158 U. S. 550.

<sup>2</sup> *Allen v. U. S.*, 164 U. S. 492.

<sup>3</sup> *Fost. C. L.* 273; *R. v. Bull*, 9 C. & P. 22; *S. v. Burke*, 30 Ia. 331; *C. v. Mann*, 116 Mass. 58; *S. v. Brooks*, 99 Mo. 137, 12 S. W. Rep. 633; *Shorter v. P.*, 2 N. Y. 193; *Young v. S.*, 11 Humph. (Tenn.) 200.

when done in execution of the king's writ, or by authority of a custom by which a thief hand-having and back-bearing, an outlaw, or perhaps other manifest felons, might be taken by force without a warrant;<sup>1</sup> in short, in cases where the homicide was committed in execution of the law. In all other cases, whether of misadventure or of necessary self-defense, the defendant could set up no justification but must be convicted; to use the words of Pollock and Maitland, he deserved but needed a pardon.<sup>2</sup> Thus in the Shropshire eyre of 5th John, "Robert of Herthale, arrested for having in self-defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter."<sup>3</sup> The king "*de gracia sua et non per iudicium*" issued a pardon in such cases.<sup>4</sup> On the other hand where one in pursuit of a robber escaping from arrest beheaded him as he ran, the act was justifiable;<sup>5</sup> and one who in resisting a robber killed him was acquitted;<sup>6</sup> but a woman who killed to defend herself from rape was not acquitted.<sup>7</sup> The line between homicide in execution of the law and homicide by misadventure or *se defendendo* was not yet clearly defined; but the distinction was well established.

It had become the practice of the Clerks in Chancery to issue a writ (similar to the writ *de odio et atia*) to inquire whether a homicide for which a man was under arrest had been committed "by misfortune, or in his own defence, or in any other manner without felony"; but by the Statute of Gloucester<sup>8</sup> this was forbidden, and it was provided that a verdict should be found before the justices in eyre or gaol-delivery, and then "by the report of the justices to the king the king shall take him to his grace, if it please him."<sup>9</sup>

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<sup>1</sup> 2 P. & M. Hist. 476.

<sup>2</sup> 2 P. & M. Hist. 477; and see the extract from an old Precedent Book there quoted: "By way of judgment we say that what you did was done in self-defense; but we cannot deliver you from your imprisonment without the special command of our lord the king."

<sup>3</sup> 1 Seld. Soc. 31.

<sup>4</sup> B. N. B. pl. 1216.

<sup>5</sup> 4 Staff. Coll. 214; see also B. N. B. pl. 1084.

<sup>6</sup> Mait. Pl. Glouc. 94 (translated, Kenny, Cas. Cr. L. 139).

<sup>7</sup> Page, North. Ass. Rolls 85. See a strong case the other way in the same eyre, *ibid.* 94.

<sup>8</sup> 6 Ed. I. c. 9.

<sup>9</sup> This does not indicate a more liberal treatment of such cases, as Coke (3d Inst. 55, following the suggestion in 21 Ed. III. 17, pl. 23) supposes, but the contrary.



The law as it was in the time of Edward I. remained long unchanged. One protecting himself from robbery or executing the law might kill and be justified.<sup>1</sup>

"Where a man justifies the death of another, as by warrant to arrest him, and he will not obey him, or that he comes to his house to commit burglary and the like, if the matter be so found the justices let him go quit without the king's pardon; it is otherwise where a man kills another by misfortune, &c."<sup>2</sup>

In Compton's Case<sup>3</sup> Thorpe, C. J., said:

"When a man kills another by his warrant he may well avow the fact, and we will freely acquit him without waiting for the King's pardon by his charter in the case. And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he cannot take them. And note how it was with a gaoler who came to the gaol with a hatchet in his hand, and just then the prisoners had broken their irons, and were all ready to have killed him, and they wounded him sorely, but with the hatchet in his hand he killed two, and then escaped, &c. And it was adjudged in this case by all the council that he would not have done well otherwise, &c. Likewise he said that every person might take thieves in the act of larceny, and felons in the act of felony, and if they would not surrender peaceably, but stood on their defence, or fled, in such case he might kill them without blame, &c."

But if one killed another by misfortune or in necessary self-defense his chattels were forfeited, and he must get the king's pardon.<sup>4</sup>

"It was presented that a man killed another in his own house *se defendendo*. It was asked whether the deceased came to have robbed him; for in such case a man may kill another though it be not in self defense. *Quod nota*. And the twelve said not. Wherefore they were charged to tell the way how &c. it happened, whereby he should obtain the king's pardon."<sup>5</sup>

And if the killing were unnecessary not only could there be no acquittal, but there would not even be a pardon.

<sup>1</sup> F. Coron. 330 (3 Ed. III.); 26 Lib. Ass. pl. 23 (translated, Kenny, Cas. Cr. L. 137); 26 Lib. Ass. pl. 32.

<sup>2</sup> F. Coron. 261 (T. 22 Ed. III.).

<sup>3</sup> 22 Lib. Ass. 97, pl. 55 (translated, Beale, Cas. Cr. L. 316).

<sup>4</sup> 21 Ed. III. 17, pl. 23; 44 Ed. III. 44, pl. 55 (*semble*); 2 H. IV. 18, pl. 6; F. Coron. 284, 287.

<sup>5</sup> F. Coron. 305 (3 Ed. III.).

"Note that at the delivery of Newgate, before Knyvet [C. J.] and Lodelow [C. B.] it was found that a chaplain *se defendendo* slew a man, and the justices asked how. And [the jurors] said that the man who was killed pursued the chaplain with a stick and struck him, and he struck back, and so death was caused. And they said that the slayer, had he so willed, might have fled from his assailant. And therefore the justices adjudged him a felon, and said that he was bound to flee as far as he could with safety of life. And the chaplain was adjudged to the Ordinary."<sup>1</sup>

The pardon in cases of self-defense was a matter of course; the speaking to the king was naturally a mere form; the Chancellor signed the pardon in the king's name. But it was needless to keep up a form based upon a rule of law obviously opposed to equity. The Chancellor as the dispenser of equity soon dispossessed the Chancellor as the mere keeper of the great seal. As early as the beginning of the reign of Edward III. he relieved against judgments of conviction in such cases.

"Note that when a man is acquitted before the justices errant for death of a man *soy defendendo*, the process is such, that he shall have the writ of the Chief Justice, within which writ shall be contained all the record of his acquittal, to the Chancellor; who shall make him his writ of pardon without speaking to the King by course of law. Such a man is bailable after the acquittal, &c."<sup>2</sup>

"Scrope [C. J.] and Louthur, Justices, ordered the prisoner to remove the record into the Chancery; and the Chancellor made him a charter in such case without speaking to the king."<sup>3</sup>

In 4 Henry VII. the report reads:

"In the Chancery it was moved that one was indicted because he killed a man *scipsum defendendo*, &c. And the Chancellor said that the indictment should be removed into the King's Bench, and that he would grant a pardon of common grace unto the party according to their form. And it was suggested by the Sergeants at the bar that there was no need of having any pardon in this case; for here the Justices would not arraign him, but dismiss him, &c.; but if the indictment were for felony, and the party put himself upon the inquest for good and ill according to the Statute of Gloucester, c. 9, then if the inquest found that he did it *se defendendo* the Justices would adjudge him to prison until he had a pardon; but here he should be dismissed, and not lose his goods.

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<sup>1</sup> 43 Ass. pl. 31: translated Kenny, Cas. Cr. L. 141.

<sup>2</sup> F. Coron. 361 (3 Ed. III.).

<sup>3</sup> F. Coron. 297 (3 Ed. III.).

"FAIRFAX [Justice of the King's Bench], who was in the Chancery, went to his companions, and returned and said, that their custom was to take inquest and inquire whether he did it *se defendendo* or not, and if so found he lost his goods, &c. ; and so in either way he should have a pardon by his opinion. And so it seemed to the Chancellor that a charter should be granted.

"Note the opinion of the Justices of the Bench against the Sergeants."<sup>1</sup>

Though in a difference between the bench and the bar the bench triumphs for a time, the opinion of the bar, if tenaciously held, will in the end prevail. In 1534 the jury found that the accused killed his victim in his own defense. "Wherefore he should have his charter of pardon. And Port, J. adjudged that he should go *adieu. Quod nota.*"<sup>2</sup> This was perhaps the first case of self-defense after the statute 24 Henry VIII. c. 5.<sup>3</sup> This statute indicated the feeling of the time against a formal conviction in such cases; and though in terms it referred only to forfeiture, it was taken as providing for acquittal without formal pardon.<sup>4</sup> It was, moreover, liberally interpreted to cover similar cases.

Thus the equitable defense, partly as the result of a statute and partly by the liberality of the courts of common law, became a legal defense. When the necessity ceased for a formal pardon in cases clearly not within the statute one cannot say. The pardon was so purely a matter of form that Coke does not mention it;<sup>5</sup> and though Lord Hale speaks of it incidentally,<sup>6</sup> in his time it would seem that one who killed in necessary self-defense was ac-

<sup>1</sup> 4 H. VII. 2, pl. 3: So B. Chart. de Pardone 65, "Home avera chartere de perdon de course hors del Chancerie pur mort de home se defendendo, 4 H. VII. 2."

<sup>2</sup> 26 H. VIII. 5, pl. 21.

<sup>3</sup> "Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway . . . or in their mansions . . . should happen in his or their being in such their felonious intent to be slain by him or them whom the said evil-doers should so attempt to rob or murder; . . . the said person . . . should for the death of the said evil disposed person forfeit or lose his goods and chattels for the same, as any other person should do that by chance-medley should happen to kill or slay any other person in his or their defence; . . . be it enacted . . . That if any person . . . be indicted or appealed of or for the death of any such evil disposed person . . . [he] shall not forfeit or lose any lands, tenements, goods, or chattels . . . but shall be thereof and for the same fully acquitted and discharged, in like manner as the same person or persons should be if he or they were lawfully acquitted of the death. . . ."

<sup>4</sup> Cooper's Case, Cro. Car. 544.

<sup>5</sup> 3d Inst. 55.

<sup>6</sup> 1 P. C. 489.

quitted, since the felony alleged in the indictment was disproved.<sup>1</sup> Before the time of Foster the old law had been forgotten, and acquittal was a matter of course.<sup>2</sup>

It will thus appear that the history of the law of self-defense to the middle of the eighteenth century had been as follows. Self-defense merely was no excuse, but ground for pardon; but it was an excuse in equity, and the equitable defense was at last accepted at law.<sup>3</sup> Killing in due execution of law was justifiable. This meant at first killing under warrant or by custom; later private persons were permitted to execute the law upon felons in a few cases. These cases were almost without exception attacks by robbers: attempted murder or rape could not thus be justifiably prevented by a private person.

There seems no sufficient reason for distinguishing between killing a robber and killing a felon who is attempting murder or rape;<sup>4</sup> but the law is explicit. It is thus summed up by Coke.<sup>5</sup>

"If a thief offer to rob or murder B either abroad or in his own house, and thereupon assault him, and B defend himself without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything. . . . So if any officer or minister of justice that hath lawful warrant," &c.

The expression "if a thief offer to rob or murder B," as shown both by the context and by the authorities cited, means if a thief come and demand B's money or his life, *i. e.* threatens homicide only as an alternative to robbery, and the force used in defense is used solely to prevent the consummation of the robbery. Even fatal force may be used for this purpose, "for a man shall never give way to a thief." Coke did not mean to suggest that one could kill a thief who threatened murder but not robbery; nor did Stanford,<sup>6</sup> nor Hale,<sup>7</sup> nor Hawkins.<sup>8</sup> A different turn was given the words by Foster.

Killing for which justification was allowed must be necessary;

<sup>1</sup> 2 Hale P. C. 258.

<sup>2</sup> Fost. P. C. 273.

<sup>3</sup> The old French law took the same course; see *Pandectes Françaises*, Rec. vol. 37, p. 574.

<sup>4</sup> 1 Hawk. P. C. 172.

<sup>5</sup> 3d Inst. 5b.

<sup>6</sup> Stanf. P. C. 14b.

<sup>7</sup> 1 Hale P. C. 481.

<sup>8</sup> 1 Hawk. P. C. 172.

that is, it was permitted only when to refrain from killing the malefactor would necessarily leave him free to commit his crime and escape.<sup>1</sup>

## II.

Thus stood the law at the time Sir Michael Foster published his essay on Homicide.<sup>2</sup> He complains of "darkness and confusion upon this part of the law"; "the writers on the Crown-law . . . have not treated the subject of self-defence with due precision."<sup>3</sup> He distinguishes between justifiable and merely excusable self-defense, the latter at common law requiring a pardon and causing forfeiture. The rules which he laid down are still commonly repeated.

"In case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprize to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable."<sup>4</sup> "Where a known felony is attempted against the person, be it to rob or murder, here the party assaulted may repel force by force; . . . and if death ensueth, the party so interposing will be justified. In this case nature and social duty cooperate."<sup>5</sup>

Here we see two errors contributing to bring about an erroneous statement of law. The first is a misunderstanding of Coke's and Hale's phrase. (here cited from Hale), "to rob or murder." Foster understands the passage in Hale to mean, if a thief comes to rob a man, or if he comes to murder him, the assailed may justifiably kill; and he generalizes that if any felony is attempted the killing in defense will be justifiable, not excusable. The other error is a result of the philosophy of the time. The right of self-defense, he argues, is founded in the law of nature, and cannot be superseded by a law of society. In cases of necessity the law of society fails; and the victim is remitted to his natural rights. The fallacy of such an argument in a legal treatise is more apparent now than at the time Sir Michael Foster wrote.

This distinction between justifiable and merely excusable homi-

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<sup>1</sup> Coke 3d Inst. 55; 1 Hale P. C. 479; 1 Hawk. P. C. 168. "Inevitable necessitie." Stanf. P. C. 136.

<sup>2</sup> First ed., 1762.

<sup>4</sup> *Ibid.*, 273.

<sup>3</sup> Crown Law, 273.

<sup>5</sup> *Ibid.*, 274.

cides, opposed as it was to every preceding authority, has been very generally accepted without examination.<sup>1</sup> It was repeated almost word for word by East<sup>2</sup> and Russell.<sup>3</sup> Owing to the absence of modern cases, the question has become a purely academic one in England.<sup>4</sup>

The distinction between justifiable and excusable homicide before this time was a distinction between a killing for which one would be acquitted and one for which one must be convicted and pardoned. Foster for the first time uses it as the test of a case where one whose life is in danger must retreat before killing. To pass upon the correctness of this theory, it is necessary to examine the history of the law in this matter.

As has already been seen, before one could kill justifiably absolute necessity must be shown. If the killing were in the effort to effect an arrest, the necessity could not properly be avoided by retiring or permitting the escape, since that would be a dereliction of duty; and if the killing were to prevent robbery it could not properly be avoided by leaving the robber in possession of the booty, since the object of the law in giving the justification would not then be attained.<sup>5</sup> But if one murderously assailed could escape the attack by retreating, he must retreat rather than kill.<sup>6</sup> "For though in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another."<sup>7</sup>

In one case a person attacked might properly defend himself against attack without retreating, that is, where he was attacked in his dwelling-house. He might defend his castle against felonious

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<sup>1</sup> An admirably correct statement of the true distinction will be found in Pond v. P., 8 Mich. 150, 177, *per* CAMPBELL, J.

<sup>2</sup> 1 P. C. 271.

<sup>3</sup> 3 Russ. Cr. (6th ed.) 213.

<sup>4</sup> Steph. Dig. Cr. L. 160 n. Stephen emphasizes the duty of retreat if possible.

<sup>5</sup> Coke, 3d Inst. 56.

<sup>6</sup> F. Coron. 297 (3 Ed. III.); 43 Ass. pl. 31. "A faire deffinition de homicide *se defendendo*; doyoums dire que il est properment quant A. fait affray sur B. et luy ferist, et B. s'enfua tant come il peut pur salvation de sa vie, issint que il est venus a un streit, ouster que il ne peut fuer, et A. continua l'assant, per que B. luy ferist et occida, ceo est homicide *se defendendo*." Stanf. P. C. 15.

<sup>7</sup> 1 Hale P. C. 481. *Acc. Daver's Case*, Godb. 288 (*semble*); *Calfielde's Case*, 1 Ro. 189.



attack without retreating from it, since that would be to give up the protection of a "castle," which the law allows him.<sup>1</sup>

The line between legal resistance and duty to avoid by retreat the necessity of killing does therefore coincide with the line between justifiable and unjustifiable homicides in the old law, that is, between cases of execution of the law and cases of private defense; but by no means with the line drawn by Foster between justifiable and excusable homicide.

There is, however, another principle, entirely different in origin, which requires one under some circumstances to retreat before killing; and this applies only in cases which come under Foster's category of excusable self-defense. In case of mutual combat neither party may kill during the combat and be either justified or pardoned; for either by bringing on the combat or at least by consenting to it and voluntarily taking part in it he has become responsible for the necessity and is guilty of the death both at law and in equity. He can protect himself only by clearing himself from this responsibility. This he can do by withdrawing from the combat in such a way that anything which happens subsequently is chargeable not to him, but entirely to the other party, who wrongly continues or renews the attack. This is expressed by the rule that in case of chance-medley one must "flee to the wall" before he can excusably kill.<sup>2</sup> One who assails another intending to kill him cannot excusably kill even if he retreats to a wall; he must not merely try to escape, but he must actually escape from the conflict and put an end to it, or he will be guilty if he kills.<sup>3</sup> It will be noticed that the retreat in this case is not for the purpose of avoiding *unnecessary* killing; even a necessary killing in such a case, as where the conflict is so hot that neither party can withdraw, will not be excused. Its only purpose is to put an end to the conflict, or at least to free the killer from further responsibility for it. "Otherwise," said Sir Matthew Hale, "we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*."<sup>4</sup>

Foster seems not to have distinguished between the retreat to avoid the necessity to kill, and the retreat to avoid responsibility for the combat; and in view of the fact that one sort is required in all cases where there is no true justification, and the other sort is

<sup>1</sup> 26 Lib. Ass. pl. 23; 21 H. VII. 39, pl. 50; R. v. Ford, J. Kel. 51; 1 Hale P. C. 486

<sup>2</sup> F. Coron. 284, 286; 1 Hale P. C. 479, 482.

<sup>3</sup> 1 Hale P. C. 479.

<sup>4</sup> *Ibid.* 482.

not required where the slayer is not in fault, his erroneous distinction between justifiable and excusable homicide appears the more specious, and his rule that retreat was not necessary in justifiable felonies follows naturally.

### III.

Since Foster's time the law of England upon the duty of retreat has not been brought into the courts; Stephen<sup>1</sup> speaks of the law contained in the authorities as "a curious relic of a time when police was lax and brawls frequent." In this country, however, the matter has frequently been considered, and in several jurisdictions it has been held that one who, being without fault, is murderously assailed may stand his ground and justifiably kill his assailant.<sup>2</sup> On the other hand, in several jurisdictions it is held that if the necessity of killing may be safely avoided by retreating, the party assailed must retreat rather than kill.<sup>3</sup>

The cases which support the former opinion are based upon one of two contradictory grounds: 1, that they are following English authority; 2, that they are opposed to English authority, but the conditions of the new country require a different rule. The first ground is that alleged in the leading case of *Erwin v. State*.<sup>4</sup> The court explained elaborately Foster's distinction between excusable and justifiable homicide, and based its decision upon that distinction. On the other hand, in *Runyan v. State*,<sup>5</sup> the other leading case upon this subject, it was argued that

<sup>1</sup> Dig. Cr. L. 160 n.

<sup>2</sup> *La Rue v. S.*, 64 Ark. 144, 41 S. W. Rep. 53 (but see *Elder v. S.*, 69 Ark. 648, 65 S. W. Rep. 938); *P. v. Lewis*, 117 Cal. 186, 48 Pac. Rep. 1088 (*semble*); *Ritchey v. P.*, 23 Col. 314, 47 Pac. Rep. 272 (statutory); *Ragland v. S.*, 111 Ga. 211, 36 S. E. Rep. 82; *Page v. S.*, 141 Ind. 236, 40 N. E. Rep. 745; *S. v. Hatch*, 57 Kan. 420, 46 Pac. Rep. 708; *Holloway v. C.*, 11 Bush (Ky.) 344; *McClurg v. C.*, 17 Ky. L. Rep. 1339, 36 S. W. Rep. 14; *McCall v. S.* (Miss.), 29 So. Rep. 1003; *S. v. Bartlett* (Mo.), 71 S. W. Rep. 148; *Willis v. S.*, 43 Neb. 102, 61 N. W. Rep. 254; *S. v. Kennedy*, 7 Nev. 374; *Erwin v. S.*, 29 Oh. St. 186; *Hays v. T.* (Ok.), 52 Pac. Rep. 950; *Nalley v. S.*, 30 Tex. App. 456, 17 S. W. Rep. 1084 (statutory); *Stoneham v. C.*, 86 Va. 523, 10 S. E. Rep. 238.

<sup>3</sup> *Allen v. U. S.*, 164 U. S. 492; *U. S. v. King*, 34 Fed. Rep. 302; *Henson v. S.*, 120 Ala. 316, 25 So. Rep. 23; *S. v. Brown* (Del.), 53 Atl. Rep. 354; *U. S. v. Herbert*, 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354a; *Davison v. P.*, 90 Ill. 221; *S. v. Donnelly*, 69 Ia. 705, 27 N. W. Rep. 369; *Pond v. P.*, 8 Mich. 150 (*semble*); *S. v. Rheams*, 34 Minn. 18, 24 N. W. Rep. 302; *P. v. Constantino*, 153 N. Y. 24, 47 N. E. Rep. 37; *S. v. Gentry*, 125 N. C. 733, 34 S. E. Rep. 706; *C. v. Drum*, 58 Pa. St. 9; *S. v. Summer*, 55 S. C. 32, 32 S. E. Rep. 771; *S. v. Roberts*, 63 Vt. 139, 21 Atl. Rep. 424; *S. v. Zeigler*, 40 W. Va. 593, 21 S. E. Rep. 763.

<sup>4</sup> 29 Oh. St. 186.

<sup>5</sup> 57 Ind. 80.

"the ancient doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement, or even to save human life."

While these two decisions, so contradictory in reasoning, are cited together in many cases as the twin harmonious pillars of the brutal doctrine they support,<sup>1</sup> the real reason at the basis of such decisions is that of the Indiana case. In the West and South, where most of these authorities are found, it is abhorrent to the courts to require one who is assailed to seek dishonor in flight. The ideal of these courts is found in the ethics of the duelist, the German officer, and the buccaneer.

"The right to go where one will, without let or hindrance, despite of threats made, necessarily implies the right to stay where one will, without let or hindrance. These remarks are controlled by the thought of a lawful right to be in the particular locality to which he goes or in which he stays. It is true, human life is sacred, but so is human liberty. One is as dear in the eye of the law as the other, and neither is to give way and surrender its legal status in order that the other may exclusively exist, supposing for a moment such an anomaly to be possible. In other words, the wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor. And this idea of the non-necessity of retreating from any locality where one has the right to be is growing in favor, as all doctrines based upon sound reason inevitably will. . . .

"But nothing above asserted is intended to convey the idea that one man, because he is the physical inferior of another, from whatever cause such inferiority may arise, is, because of such inferiority, bound to submit to a public horsewhipping. We hold it a necessary self-defense to resist, resent, and prevent such humiliating indignity, — such a violation of the sacredness of one's person, — and that, if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity."<sup>2</sup>

As this is the sentiment of so many courts in certain parts of the country, it is fair that it should be answered by another court from the same section.

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<sup>1</sup> *Beard v. U. S.*, 158 U. S. 550; *P. v. Hecker*, 109 Cal. 451, 42 Pac. Rep. 307; *Willis v. S.*, 43 Neb. 102, 61 N. W. Rep. 254.

<sup>2</sup> *S. v. Bartlett (Mo.)*, 71 S. W. Rep. 148, 151.

"No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live."<sup>1</sup>

And Agnew, J., said:<sup>2</sup>

"It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom our liberties would be worthless. But the law does not apply this right to homicide. The question here does not involve the right of merely ordinary defence, or the right to stand wherever he may rightfully be, but it concerns the right of one man to take the life of another. Ordinary defence and the killing of another evidently stand upon different footing. When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall rather flee than that the latter shall die."<sup>3</sup>

<sup>1</sup> Charge approved in *Springfield v. S.*, 96 Ala. 81, 11 So. Rep. 250.

<sup>2</sup> *C. v. Drum*, 58 Pa. St. 9, 22.

<sup>3</sup> The European law is generally favorable to the right to stand one's ground. Two reasons are given: that a man cannot be constrained to take the risk even of a retreat that seems safe, and that he cannot be obliged to yield his honor and dignity by a retreat. Opinion has not been unanimous. Julius Clarus (*Lib. V., Homicidium*, § 32) states that the commonly accepted opinion requires retreat, if safe, and he collects numerous authorities to that effect. To the same effect are the strong words of the *Tribune Faure* in the *Conseil d'Etat*: "Le citoyen qui repousse un outrage grave, n'est pas mis dans la nécessité d'opposer la force à la force; s'il frappe, s'il blesse, s'il tue, ce n'est que pour venger une injure et punir l'homme qui l'a offensé. Or, le droit de punir ne peut être confié qu'à l'autorité publique, et, en tout cas, il serait contre les règles de laisser l'offensé se constituer juge dans sa propre cause. Les tribunaux lui sont ouverts; c'est là qu'il doit demander la réparation qui lui est due" (quoted 37 *Pand. Fr. Rec.* 575). In the only reported French case upon this subject which has been found, the court took the same view: *Min. Publ. v. Prime*, Caen, Nov. 29, 1899, *Pand. Périod.* 1901. 2. 32, *Rec. arr. Caen & Rouen*, 1899. 1. 200. The prevailing doctrine in France is, however, *contra*. Thus Julius Clarus (*loc. cit.*), after stating the received opinion of his day, expresses his own opinion to the effect that one assailed need not retreat; and the same view is taken of the modern law, after collecting and comparing the authorities, by the authors of the *Pandectes Françaises* (*Pand. Fr. Rec.* vol. 37, p. 576).

The German courts also, as one might expect, protect one who when assailed stands his ground and kills. Thus the *Reichsgericht*, on May 13, 1887 (*Entsch. des R. G., Strafsachen*, vol. 16, p. 69) said: "Das Gesetz, sowie dasselbe nicht bloss die Person des Angegriffenen, sondern neben dem Vermögen auch dessen Ehre durch das Recht der Selbstverteidigung hat schützen wollen, nicht hat verlangen können, dass als Mittel dem Angriffe zu entgehen, die Flucht auch dann gewählt werde, wenn dieselbe nicht ohne eigenes Opfer an berechtigten Interessen bewirkt werden kann, namentlich also, wenn sich solche nach den Anschauungen des gesellschaftlichen Verkehrslebens unter den gegebenen Umständen als schimpflich oder unehrenhaft darstellen würde."

The Italian law appears to be the same. Thus the *Digesto Italiano* (*sus ver* *Difesa Legittima*, no. 140) cites *Impallomeni* (*Completo Trattato* 1, 191): "La dignità individuale è anch'essa un diritto personale che non si può essere costretti ad abdicare. . . . Riconosciuto che egli esercita un diritto difendendosi da un'ingiusta

In some cases, as all authorities agree, there is no need of retreat, but the assailed may kill the assailant if it is otherwise necessary to save his own life. Thus if retreat would not (so far as the assailed can see) diminish the danger, he may defend himself on the spot.<sup>1</sup> And if one is assailed in his own dwelling-house, which is his castle, he is not obliged to withdraw therefrom and leave himself in that respect defenseless.<sup>2</sup> Many authorities go further, and allow the assailed to stand his ground when he is attacked in the immediate vicinity of his dwelling-house, in his curtilage,<sup>3</sup> and there is reasonable ground for arguing that a man's right to the protection of his house necessarily extends to the immediate neighborhood of it. In a few jurisdictions this doctrine is carried still further, and one is allowed to stand his ground and kill an assailant on his own premises, though not in the neighborhood of the dwelling-house.<sup>4</sup> This appears to be the present doctrine of the Supreme Court of the United States. In *Beard v. United States*,<sup>5</sup> where the defendant was assailed on his own prem-

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aggressione, sarebbe contraddittorio imporgli tali condizioni che ne offendessero la libertà e la dignità."

The Supreme Court of Hungary (April 9, 1889, in a decision reprinted in 31 Rev. Pen. 279) proceeded upon a reasonable distinction. The facts proved showed that a son assailed by his father had killed in self-defense without retreating. The court, taking the usual European view of the question, held however that a son ought to retreat rather than kill his father.

The most ingenious limitation is that laid down in the *Pandectes Belges* (vol. 16, p. 802), citing Haus, *Droit pénal*, no. 626: "Si la fuite était déshonorante comme le serait celle d'un militaire en uniforme, quand même il ne serait pas en service, il faut bien admettre le droit de résister quand des moyens autres que la fuite font défaut. . . . Ils considéraient la fuite comme honteuse pour les *militaires* et les *gentilshommes*."

<sup>1</sup> *S. v. Peo*, 9 Houst. (Del.) 488, 33 Atl. Rep. 257; *U. S. v. Herbert*, 2 Hayw. & H. (D. C.) 210, Fed. Cas. 15354a; *P. v. Macard*, 73 Mich. 15, 40 N. W. Rep. 784; *Conner v. S.* 13 So. Rep. 934 (Miss.); *C. v. Breyesse*, 160 Pa. St. 451, 28 Atl. Rep. 824; *S. v. Roberts*, 63 Vt. 139, 21 Atl. Rep. 424 (*semble*); *Bird v. S.*, 77 Wis. 276, 45 N. W. Rep. 1126. In Alabama retreat must be attempted unless it would increase the danger. *Carter v. S.*, 82 Ala. 13, 2 So. Rep. 766.

<sup>2</sup> *Albertz v. U. S.*, 162 U. S. 499; *Brinkley v. S.*, 89 Ala. 34, 8 So. Rep. 22; *Elder v. S.*, 69 Ark. 648, 65 S. W. Rep. 938; *S. v. Middleham*, 62 Ia. 150, 17 N. W. Rep. 446; *Eversole v. C.*, 95 Ky. 623, 26 S. W. Rep. 816; *S. v. O'Brien*, 18 Mont. 1, 43 Pac. Rep. 1091; *S. v. Harman*, 78 N. C. 515; *Palmer v. S.*, 9 Wyo. 40, 59 Pac. Rep. 793.

<sup>3</sup> *Naugher v. S.*, 105 Ala. 26, 17 So. Rep. 24; *Haynes v. S.*, 17 Ga. 465; *Wright v. C.*, 8 Ky. L. Rep. 718, 2 S. W. Rep. 909; *Smith v. C.*, 16 Ky. L. Rep. 112, 26 S. W. Rep. 583; *P. v. Kuehn*, 93 Mich. 619, 53 N. W. Rep. 721; *Fitzgerald v. S.*, 1 Tenn. Cas. 505; *S. v. Cushing*, 12 Wash. 527, 45 Pac. Rep. 145.

<sup>4</sup> *Foster v. T.*, 56 Pac. Rep. 738 (Ariz.); *Baker v. C.*, 93 Ky. 302, 19 S. W. Rep. 975; *S. v. Hudspeth*, 150 Mo. 12, 51 S. W. Rep. 483 (premises or the public highway); *contra*, *Lee v. S.*, 92 Ala. 15, 9 So. Rep. 407.

<sup>5</sup> 158 U. S. 550.

ises, the court held that he was not obliged to retreat; and though in his opinion Mr. Justice Harlan pointed out more than once that the defendant was "on his premises, outside of his dwelling-house," "where he had the right to be," he apparently decided the case on the general principle laid down in *Erwin v. State* and *Runyan v. State*. In a subsequent case, however, the doctrine of the two last cases was repudiated, and *Beard v. United States* was distinguished on the ground that in that case the defendant was assailed "upon his own premises and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house."<sup>1</sup> This is an untenable distinction, for under no circumstances can one claim that mere land is his castle, or defend it as he can defend a dwelling-house.<sup>2</sup>

As to the general principle about which the American authorities are in such conflict, there should be no theoretical doubt. No killing can be justified, upon any ground, which was not necessary to secure the desired and permitted result; and it is not necessary to kill in self-defense when the assailed can defend himself by the peaceful though often distasteful method of withdrawing to a place of safety. The problem is the same now in America as it was three centuries ago in England. It is of course true that to retreat from an assailant with a revolver in his hand is dangerous, and one whose revolver is in his pocket is not to be despised; the hip-pocket ethics of the Southwest are doubtless based upon a deep-felt need. But because retreat is less often safe than in the days of knives and small-swords, it by no means follows that retreat when certainly safe should be less requisite. Because a man cannot safely retreat from a pistol, we may not infer that he need not safely retreat from a pitchfork or a blow of the fist.

The contrary argument based upon the supposed distinction between excusable and justifiable homicide we have seen to be erroneous, and to follow Foster's misunderstanding of the language of Coke. The conclusion of the courts which deny the duty to retreat is, as we have seen, more commonly rested upon two arguments: that no one can be compelled by a wrongdoer to yield his rights, and that no one should be forced by a wrongdoer to the ignominy, dishonor, and disgrace of a cowardly retreat.

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<sup>1</sup> *Allen v. U. S.*, 164 U. S. 492, 498.

<sup>2</sup> *Wallace v. U. S.*, 162 U. S. 466.



As to the argument of right, the answer of the Pennsylvania court, already quoted, is sufficient. The law does not ordinarily secure the enjoyment of rights; it grants redress for a violation of rights. Sometimes, to be sure, equity by injunction or decree attempts to protect rights rather than to redress wrongs, but this is extraordinary. Still less frequently the law permits one to protect his own rights, but in no case may he do this unless in accordance with the interests of the state. The only property which the law permits him to protect by killing a wrongdoer is his dwelling-house, and that only when its protection is necessary to the safety of his person. To test the proposed doctrine let us suppose that the owner of a large estate erects a rifle range, as he legally may, in the midst of it, and is about to shoot at a target; a trespasser, too strong to be removed by the owner, stands before the target and will not move; it will hardly be contended that the owner can continue his practice through the body of the trespasser. Yet this is the only method by which he may exercise his undoubted right to shoot.

The argument based upon the honor of the assailed is more elusive and more difficult to answer. The language of the Alabama court is, to be sure, logically conclusive; it convinces the intellect, but fails to touch the heart and the imagination, and leaves one of the same opinion still. The feeling at the bottom of the argument is one beyond all law; it is the feeling which is responsible for the duel, for war, for lynching; the feeling which leads a jury to acquit the slayer of his wife's paramour; the feeling which would compel a true man to kill the ravisher of his daughter. We have outlived dueling, and we deprecate war and lynching; but it is only because the advance of civilization and culture has led us to control our feelings by our will. And yet in all these cases sober reflection would lead us to realize that the remedy is really worse than the disease. So it is in the case of killing to avoid a stain on one's honor. A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill. The position of the assailed is an unpleasant one. The law cannot help that; it is incapable of protecting him from the painful alternative; but the necessity of undergoing illegal injuries is

one of the penalties of life in society. He does not avoid his predicament by killing.

This reasoning is not true, I admit, in the case of the border-ruffian, who walks about the earth with one hand on his hip-pocket, and shoots each similar gentleman at sight, — he would never regret that he had killed his man. But the argument itself is inapplicable. To talk of dishonor and cowardice in the case of such a cowardly and bullying brute is a bit inopportune.

But, after all, such feelings as I have described are merely the natural uncontrolled impulses of the individual; and it is to control such feelings, both forcibly and by putting an end to the necessity for their exercise, that law itself exists. The duel, war, and lynching show the unnecessary failure of law; so does the doctrine of *Runyan v. State*. If the law is to be carried out it must protect the state against such homicides. The interests of the state alone are to be regarded in justifying crime; and those interests require that one man should live rather than that another should stand his ground in a private conflict.

*Joseph H. Beale, Jr.*

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THE IMPORTANCE OF THE MERGER DECISION. — The industrial reorganization during the ten years last past may be set down as making the most important epoch in the economic history of the United States. In consequence of the stress of the situation, the law governing consolidation has been put to the test as never before. The ultimate inquiry has been as to the underlying public policy, which must always be the criterion when any question of law touches the issues of life so nearly. Once in a while, with the more emphasis because of its infrequency, the great truth is shown again that whenever there is an accepted belief among men that a certain policy is their social salvation, that belief has already become a principle of law. The decision in the *United States v. The Northern Securities Company et al.*, 120 Fed. Rep. 721, is untechnical, therefore, because it has the unreason of a policy that is believed by most to be indispensable.

When the recent movement is described as the reorganization of the industrial system, it is recognized that the change has been from one unit to another unit. The exact description is that the advance has been from a limited number of corporations into a consolidation of them. Such consolidation in the face of an adverse policy which made against combination has been an almost desperate forward movement. There have been four attempts: First, the pool — a direct agreement between the corporations for their joint operation, *Addystone Pipe Co. v. U. S.*, 175 U. S. 211; second, the trust — an indirect arrangement between the shareholders to direct the action of their corporations, *State v. Standard Oil Co.*, 49 Oh. St. 137; third, the holding corporation — a central corporation to own the shares of the constituent companies, *Compress Co. v. Compress Co.*, 70 Miss. 669; fourth,

the single corporation — which bought the properties of the former corporations outright, *Richardson v. Buhl*, 77 Mich. 632. The state of the law at the present writing is that the first and second of these, since they are without central incorporation, are within the plain rule against combination in restraint of trade; while the third and fourth, even though they have central incorporation, are under the same suspicion.

From step to step in this succession there is an evolution towards integration. Indeed the necessity of rapid organization upon the basis of unity was obvious if the law against combination was to be avoided. What makes the holding as to the organization of this Northern Securities Company of much less importance is that the process of integration had gone but half the way. There was a central corporation; but the constituent corporations were left in existence. Long before this new decision it had been recognized that the scheme of the holding company might be illegal as leaving in existence a combination in restraint of trade. *People v. Chicago Gas Trust Co.*, 130 Ill. 268; *Pearsall v. No. Pacific Co.*, 161 U. S. 646. The legality of the organization of a great industrial company upon the basis of a new incorporation is the crucial question at the present moment. The permanent interest in the Northern Securities Case must be the bearing of it upon the ultimate holding as to the legality of this final form of consolidation — a central corporation in which the constituent companies go out of existence. In truth, these last two forms are very different.

So far had the law gone that at the time of the organization of the Northern Securities Company one might have predicted that it would be obnoxious to established principles if the court applied those principles in a broad way to get at the substance of the matter rather than at the forms employed. The obvious fact was that two great railroad systems had entered into a combination in suppression of competition. It was true that in form these constituent companies were not parties to the combination. The court refused to be stopped by such a fiction. That is the portentous thing — this attitude of the court. This decision against the scheme of the holding company is a decision against a combination in fact, that is all. The present form of organization of the great industrial companies is, therefore, not touched by this decision, for the single corporation is not a combination. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484. So long as incorporation is permitted to a small enterprise, it must be permitted to a large enterprise. Any danger there may seem to be in this Northern Securities decision is not in the decision itself, but in the possibility of an extension of it.

B. W.

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CONSTITUTIONALITY OF MUNICIPAL FUEL PLANTS. — Aroused by the recent scarcity of fuel, the legislature of Massachusetts has again consulted the Supreme Court of the state as to the constitutionality of proposed legislation authorizing cities and towns to establish and operate municipal coal yards. *In re Municipal Fuel Plants*, 66 N. E. Rep. 25; cf. *Opinions of the Justices*, 155 Mass. 598; see 6 HARV. L. REV. 100. On the previous occasion five of the justices declared that such a law would be unconstitutional, on the ground that buying and selling fuel is not a public use for which taxation can be authorized, and also that it is not a legitimate governmental function. Mr. Justice Holmes, however, dissented on both points, and Mr. Justice Barker gave a qualified dissent. The present justices,

though adhering in the main to the principles formerly expressed, practically take the position of Mr. Justice Barker. In certain emergencies, they say, the government alone might be able to obtain fuel, and might then constitutionally buy and sell for the relief of the community. Mr. Justice Loring refuses to join in this qualification of the former opinion. The view taken by Mr. Justice Holmes has now no advocate on the bench.

The admission by the court that under the circumstances described municipalities might establish coal yards seems of little practical importance. Such a situation would rarely occur and would of necessity be very temporary; indeed, Mr. Justice Loring thinks it impossible. The main significance of the opinion lies in the continued and vigorous opposition of the court to radical extension of the doctrine of municipal ownership. The growing popularity of that doctrine has been attested by recent municipal elections. The extent to which popular feeling, if uncontrolled by the courts, is likely to carry it is shown by the experience of British cities. The corporation of Glasgow now owns and in many instances operates not only gas and water plants and street railways, but also scores of ordinary businesses, such as laundries and retail stores. Whether the courts may restrain and overrule the legislature in this matter, and, if they may, where they will draw the line, are therefore questions of great and increasing importance.

The legal question presented obviously is not whether such a change in our theory of the state is advisable, but whether it is constitutional. That the courts will hold it unconstitutional for a state to enter into ordinary private callings seems sure. It is probable that they will lay down some such test as "virtual monopoly," permanent control of the supply or service. See 16 HARV. L. REV. 73; *cf. State v. City of Toledo*, 48 Oh. St. 112. When a business supplying a general public need is of such a nature that a substantial monopoly is necessary or inevitable either from economic reasons or because required by the public welfare, then the state may regulate it and even engage in it. But it cannot spend the public money in operating private industries that may be well left to the regulation of competition. Under the test suggested the mining of coal might be considered a public calling, but the retail selling could not be so held. Monopolistic combinations of coal dealers, however, while not economically necessary may be so easily formed and maintained because of the absolute control of the supply by a few men that the business might be distinguished from the sale of ordinary articles. But the actual situation does not seem to warrant such a dangerous extension of the class of public callings. If the mine operators should extend their control over the entire distribution of the coal, control of the retail selling by municipalities might be considered constitutional but would be of little benefit. If the state of Pennsylvania acquired and operated the coal mines, there would be no reason why Massachusetts or its municipalities should control the distribution. It should be noticed that the court in the principal case is not rendering a decision, but is merely giving an advisory opinion. It might be more reluctant to hold actual legislation unconstitutional, but there is nothing to indicate that it would withdraw from its present position.

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INTERESTED DIRECTOR'S RIGHT TO VOTE AS STOCKHOLDER. — The validity of the recent \$200,000,000 loan to the United States Steel Corporation has again been contested, this time on the ground that the private

interest of certain directors barred their votes as stockholders. A tentative agreement for the loan from the Morgan Company was negotiated by the directors of the Steel Corporation and submitted to its stockholders. Several of these directors were members of the Morgan Company and of the syndicate which was to act as surety in the transaction, and it was conceded that without the votes on the shares controlled by such directors the necessary two-thirds vote for validating the agreement would not have been obtained. The court, in sustaining the transaction, appears to rest its argument solely upon the general proposition that in the absence of fraud private interest is no bar to a stockholder's right to vote. *Hodge v. U. S. Steel Corp.*, 54 Atl. Rep. 1 (N. J., C. A.) Another general rule of law, however, declares that when directors act as directors they cannot make a binding contract in which one of their number has a private interest. Irrespective of actual fraud, such a contract is voidable by seasonable action on the part of the corporation. *Pearson v. Concord R. R. Co.*, 62 N. H. 537. See 15 HARV. L. REV. 672. The question is therefore raised whether these two rules become inconsistent when, as in the principal case, a stockholder is also a director; and if so, which rule should be modified?

A consideration of the facts of two leading cases upon the subject shows conclusively that the rules are in substance conflicting. See *Beatty v. N. W. Transport Co.*, L. R. 12 App. Cas. 589; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483. In each case the corporation was considering the ratification of an existing though voidable contract made by interested directors, who, as a matter of fact, possessed a majority of the stock. To allow directors to vote under such circumstances is evidently to make ratification inevitable, and thus to deprive the transaction of any actual voidability. Yet the court allowed their votes under the general rule that interest is no bar to a stockholder's vote. By thus applying this rule the court completely nullified the effect of the other general rule which declares that contracts made by interested directors should be voidable. The latter rule seems to demand an entirely disinterested vote by the corporation on the question of ratification, and hence whenever an interested director is allowed to vote in the stockholders' meeting a modification of this rule results.

Granting, then, that the two rules may come into conflict, it is to be noted that the decisions cited represent the weight of authority and agree with the principal case in asserting that whatever be its effect upon other rules, the rule which declares interest no bar to the stockholder's vote is to remain unmodified. Strong reasons exist, however, for doubting the soundness of this view. The rule as to voidability of directors' contracts is highly salutary and should be made effective. It gives the corporation a free hand in discarding questionable transactions; whereas the prevailing view would frequently necessitate proof of actual fraud. This burden would rest heavily upon an objecting stockholder, since he lacks the intimate knowledge of corporate affairs possessed by a director. On the other hand, if the director's interest were made a bar to his right to vote as shareholder, no radical change in the general rule as to the stockholders' right to vote would result. The latter rule is based upon the inexpediency of entering upon an investigation as to the private interests of a great number of stockholders in order to determine the validity of corporate transactions. Under the change proposed, however, though some investigation would be necessary, it would be limited to the interests of directors, a very narrow class of persons.

It would thus seem that a director's interest should be made an exception to the general rule that interest is never a bar to a stockholder's vote.



This view has the support of an able text-writer. See TAYLOR, CORP. 5th ed., 559 b. This should apply under all circumstances, even though the corporation is not voting to ratify an existing though voidable contract, but, as in the principal case, is voting to validate an entirely void agreement

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**TRANSFER OF TITLE TO PERSONALTY WHERE SOMETHING REMAINS TO BE DONE.**—The intention of the parties is generally admitted to be the controlling factor in deciding when the title to personal property passes to a purchaser. See *Martineau v. Kitching*, L. R. 7 Q. B. 436. To obtain some uniformity in decisions, the courts have established artificial rules to determine that intention, the principal one of which is that when something remains to be done to the goods there is a presumption that title has not passed. This is properly a presumption of fact which may be rebutted if a contrary intention be shown, although in England in the special case of goods which are to be separated from a greater mass, it has been held to be a rule of law. *Graff v. Fitch*, 58 Ill. 373. See *Austen v. Craven*, 4 Taunt. 644.

In England the presumption is raised only when the act is to be done by the vendor. *Turley v. Bates*, 2 H. & C. 200. Probably this distinction arose from two circumstances. First, if what remains to be done is vital, as completion of goods before delivery, it is much more likely to be done by the vendor. Second, if the act to be done is to be performed by the vendee, it will probably be preceded by delivery to him, and that is in itself enough to show that title has passed. *Haxall, etc., Co. v. Willis*, 15 Gratt. (Va.) 434. In the absence of these accompanying circumstances there appears to be little weight in this English distinction, and it is not generally adopted in this country. *Ballantyne v. Appleton*, 82 Me. 570.

It is obvious that among the things to be done before a transaction is complete, there are some which are so vital in their nature that it is almost certain that sellers and purchasers will not intend to pass title until they are done. The separation of goods from a greater mass is an example of this. The parties might sell an undivided interest in the mass, but they will in general intend a sale of an ascertained quantity. *Kimberly v. Patchin*, 19 N. Y. 330; *Warren v. Buckminster*, 24 N. H. 336. Consequently they will intend that the goods shall be separated before title passes. Again, where the goods have to be changed or altered in some way to put them in a condition to fulfil the terms of the sale, title will usually not be intended to pass until this is done. *West Jersey, etc., Co. v. Trenton, etc., Co.*, 32 N. J. Law 517. The same would seem to be true where the goods must be inspected to ascertain whether they conform to the requirements of the contract.

On the other hand, there are many cases where the only thing to be done is some slight act, such as measuring or weighing the goods in order to determine the exact price to be paid. Thus in a recent North Carolina case the principal thing remaining to be done was to measure the wood sold. No notice was taken of the relative unimportance of the act, and the court applied the usual presumption. *Porter v. Bridgers*, 43 S. E. Rep. 551. Yet when parties contract to sell a definite mass of goods which are ready for delivery, it is probable that they intend to regard the goods as the purchaser's from that time, even though the exact price is to be determined later. A few cases have therefore taken the view that in trans-

actions of this sort the presumption does not exist. *Sanger v. Waterbury*, 116 N. Y. 371. It is to be regretted that such a desirable result has not been reached more frequently. But the general law is undoubtedly that even when the only thing that remains to be done is to ascertain the price the presumption is that title has not passed. *Devane v. Fennell*, 2 Ired. (N. C.) 36. It is submitted, however, that even slight evidence of a contrary intent, such as part payment of the price, should be sufficient to overthrow the presumption. *Cf. Byles v. Colier*, 54 Mich. 1.

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HAS A TRUSTEE A DUAL PERSONALITY? — The proposition that a judgment against a person sued as an individual does not work an estoppel in a second action in which he appears in order to litigate rights which he has as a representative, is laid down by several text-writers. 2 BLACK, JUDG. § 536; 1 FREEMAN, JUDG. § 156. The reason assigned is that every representative has in legal contemplation a representative personality, distinct from his individual personality. See WELLS, RES ADJUDICATA § 21. By an application of this doctrine, a recent Kansas case holds that judgment in a foreclosure suit against a person individually does not bar him from subsequently setting up a claim to the property as trustee. *Farmers', etc., Co. v. Essex*, 71 Pac. Rep. 268.

It is undoubtedly true that some classes of representatives have received in their representative capacity a legal recognition which justifies in their case the application of the doctrine under discussion. An executor, for example, is treated in his official capacity as continuing the personality of his testator. The goods of the estate were not forfeited for the executor's treason; nor could they be taken in execution on a judgment against him as an individual; and personal disability did not prevent him from maintaining an action as executor. 1 HALE P. C. 251; WENTW. OFF. EX. 14th ed. 36; *McCleod v. Drummond*, 17 Ves. 152, 169. It is accordingly almost universally held that matters concluded in an action to which an executor, as such, was a party, are not *res judicata* in an action in which he appears as an individual. *Carey v. Roosevelt*, 102 Fed. Rep. 569. There has been, however, no such recognition of the official personality of the trustee. Trust property was liable to forfeiture for his crime, and his title in the trust *res* could be taken in execution by his creditors. *Stith v. Lookabill*, 71 N. C. 25; see *Pawlett v. Atty. General*, Hard. 466.

It might be argued, however, that although the trustee in his representative capacity has not been accorded legal recognition for other purposes, he should receive it for purposes of judgment. Although the doctrine of the text-writers already noted appears to sustain this view, an examination of the cases cited in support of it will show that a large proportion of them are not in point, since they were decided on the ground that the issue in question in the second suit was not involved in the first. See *McNutt v. Trogden*, 29 W. Va. 469. Practically all the remaining cases concern executors or other representatives whose separate official existence has been recognized by the law. Furthermore, an examination of the cases concerning trustees shows the weight of authority to be against the partial recognition suggested. Thus a recent Kentucky case holds that although the defendant was summoned as trustee, she was present in her individual capacity. *Commonwealth v. Hamilton*, 72 S. W. Rep. 744. This accords with the doctrine of other jurisdictions. *Shephard v. Creamer*, 160 Mass. 496.

On principle, the doctrine of the Kansas case that a judgment against a party described as trustee binds him in his representative capacity only, involves the inconsistency that while both his individual and his representative rights are held by him as one person, in order to enforce those rights he must become two persons. The doctrine is objectionable, moreover, on grounds of convenience, since it introduces new difficulties into the already complicated doctrine of *res judicata*, and tends to unsettle other departments of the law of trusts.

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**DAMAGES IN TROVER FOR SEVERANCE FROM REALTY.**—A recent Alabama decision raises the unsettled question as to the measure of damages in trover for the conversion of coal severed from the realty by an innocent trespasser. *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.*, 33 So. Rep. 547. The case holds that the plaintiff may recover as damages the value of the coal immediately after severance. This rule was originally enunciated in England in *Martin v. Porter*, 5 M. & W. 351. A later decision, however, held that if the wrongdoer acted in good faith, the plaintiff might recover only the value of the coal in place. *Wood v. Morewood*, 3 Q. B. 440 n. This represents the existing rule in England. *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25. The decisions in the United States, while they follow the English rule as to the measure of damages for a wilful taking, are in conflict as to an innocent taking. *Forsyth v. Wells*, 41 Pa. St. 291; *McLean County Coal Co. v. Lennon*, 91 Ill. 561. The same question has arisen with regard to trees and has resulted in the same difference of opinion. *Ayres v. Hubbard*, 71 Mich. 594; *White v. Yawkey*, 108 Ala. 270.

It is well recognized that the basic principle underlying the theory of damages in the common law is compensation for loss suffered. Any departure from that principle should have a clearly defined reason to support it. *Allison v. Chandler*, 11 Mich. 542. It is true that the general rule of damages in trover is the value of the chattel at the time of conversion. See SEDG. DAM. 8th ed. § 493. It would seem, however, that this general rule has its foundation in the fact that in the large majority of cases it will approximately determine the actual loss suffered. Accordingly, in a number of instances where the rule would not fulfil that purpose, a different measure of damages has been applied. Thus where a party wrongfully attached another's property, and subsequently attached it rightfully, it was held that the damages in an action of trover would be reduced in so far as the chattel had been applied under the second attachment in satisfaction of the plaintiff's debt. *Curtis v. Ward*, 20 Conn. 204. Similarly, it is well settled that where property is converted and subsequently returned and accepted by the owner, the damages will be reduced to the actual loss suffered. *Greenfield Bank v. Leavitt*, 34 Mass. 1.

The argument of the principal case is that when the coal is separated it is the plaintiff's chattel, and consequently, applying the general rule, it follows that for depriving him of that chattel, the damages must be the value of the coal immediately after severance. But since the damages recovered included the value of the labor expended by the defendant in mining the coal, they were obviously more than the actual loss suffered. On the principle of the cases cited above, therefore, there would seem to be a sufficient reason for departing from the general rule. The fact that in those cases

the circumstance which caused the reduction in damages occurred after the conversion does not seem material. *Waters v. Stevenson*, 13 Nev. 157. They go rather on the ground that the general rule of damage would give the plaintiff more than compensation. For these reasons a result different from that reached in the principal case would seem to be preferable both in point of justice and as a matter of theory.

On principle the same result should be reached in case the taking were wilful, but the courts would ordinarily give the value at the time of conversion as a punishment to the wrongdoer.

**IMPLIED WARRANTY AGAINST LATENT DEFECTS.** — It is frequently stated that a vendor impliedly warrants the merchantability of goods sold to a purchaser who has no opportunity to examine them. It is doubtful, however, whether this warranty extends to defects not discoverable by examination. A recent English case, decided under the Sale of Goods Act, suggests the question how far the law will imply a warranty against such latent defects. The plaintiff was poisoned by some beer which he bought from the defendant, a retail seller. The presence of the poison which the beer contained could have been detected only by a skilful chemical test. Yet it was held that there was an implied warranty by the defendant that the beer was fit to drink. *Holt v. Wrenn*, 19 T. L. R. 292 (Eng., C. A.).

There is an apparent conflict on the subject of warranties against latent defects, owing to a failure to distinguish between warranties implied in law and warranties implied from the description of the goods sold. Where, for instance, grain is sold as "No. 2 White Wheat," there is a warranty that the grain sold agrees with the description. *Whitaker v. McCormick*, 6 Mo. App. 114. This is often called an implied warranty, but, since it arises only from the words used by the parties, it is in its nature rather express than implied. For that reason it is rightly held to cover latent defects. *Wolcott v. Mount*, 38 N. J. Law 496. But with regard to a warranty of merchantability, which is a true implied warranty, American courts have drawn a sharp distinction between sales by a dealer and sales by a manufacturer. The manufacturer is held to warrant against all defects, whether they are discoverable by examination or not. *Rodgers v. Stiles*, 11 Oh. St. 48. The dealer is held to warrant only against discoverable defects. *White v. Oakes*, 88 Me. 367.

Whether there is sufficient difference between the two to justify the distinction may well be doubted. The situation of the dealer differs from that of the manufacturer, if at all, only in that the former has not so great an opportunity to obviate or detect the defect. But, while this difference might have its bearing on the dealer's tort-liability for negligence, it does not necessarily mean that he has impliedly promised less. An implied warranty is arrived at by reading into the contract a stipulation which it does not contain, but which the parties would have inserted, had their attention been directed to the possibility of a defect. In determining what this stipulation must be, the true test is what the generality of mankind would regard as fair under the circumstances. The ordinary purchaser would certainly expect to get as good an article from the dealer as from the manufacturer for the full price he has paid. And on the other hand it is no hardship on the dealer to make good the deficiency in an article for which he has received full value. True, if a warranty be implied the dealer might be liable for large collateral

damages. *Passinger v. Thorburn*, 34 N. Y. 634. But these are suffered only in comparatively few instances; the hardship of the rule is no greater on the dealer than on the manufacturer, who is presumably not negligent; and the dealer has his remedy over against his vendor on the latter's implied warranty. For these reasons it is believed that the modification of the doctrine of *caveat emptor* by the Sale of Goods Act, by which all sellers impliedly warrant the merchantability of goods sold, is worthy of legislative imitation as the just and more politic rule.

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**PROVOCATION IN MITIGATION OF DAMAGES.** — Evidence of provocation is admitted everywhere in mitigation of punitive damages. *Kiff v. Youmans*, 86 N. Y. 324; *Ward v. Blackwood*, 41 Ark. 295. Obviously the more a defendant acts under provocation, the less is he deserving of punishment. Furthermore, to give a plaintiff a fine made necessary partly by his own conduct would place a premium upon inciting the commission of torts.

The mitigation of compensatory damages on account of provocation, however, presents a question upon which the decisions are in confusion. Many courts refuse altogether to allow such mitigation, holding that to do so would be to violate the well established principles that mere words cannot justify an assault, and that one who has been injured by another without legal justification can recover for the loss which he has suffered. *Goldsmith v. Foy*, 61 Vt. 488; *Fenelon v. Butts*, 53 Wis. 344. Of those courts which allow the mitigation of compensatory damages, some do so for the same reason for which they allow the mitigation of punitive damages, overlooking the distinction that punitive damages are exacted only by way of punishment, while compensatory damages are given merely to recompense for actual loss. *Fraser v. Berkeley*, 7 C. & P. 621. Others adopt a ground which may be best described as a sort of "moral set-off," the defendant being allowed to balance his ethical claims against the legal claims of the plaintiff. *Burke v. Melvin*, 45 Conn. 243. In still others it has been vaguely suggested that the doctrine of punitive damages should be mutual, that it should apply to the conduct of the plaintiff as well as to that of the defendant. *Robison v. Rupert*, 23 Pa. St. 523.

This last suggestion would seem to embody the correct principle. Through punitive damages the community punishes the defendant by making him pay more than is necessary to compensate the plaintiff; through mitigation of damages it punishes the plaintiff by giving him less than will compensate him for the loss which he has suffered. In both cases a penalty is placed upon the wrongdoer primarily to punish him, and this is given to the other party only incidentally for reasons of convenience. See *S&C.D. DAM.* 8th ed. § 352 f. On this ground it is believed that a recent New York case which extends the doctrine of *Kiff v. Youmans*, *supra*, to the mitigation of compensatory damages was correctly decided. It carries out consistently the New York attitude as to punitive damages. *Genung v. Baldwin*, 77 N. Y. App. Div. 584. Since mitigation of damages is only punitive damages in another form, the above reasoning does not apply to states in which the doctrine of punitive damages is repudiated. There the arguments that criminal and tort liability should not be confused, and that an action fitted for securing compensation for private injury is not adapted to punishing public wrong, would be applied equally to both forms of punitive damages. *Mangold v. Oft*, 88 N. W. Rep. 507 (Neb.).

It should be noted, that wholly apart from any question as to mitigation of damages, evidence as to provocation is always material in determining the extent of the actual injuries to the plaintiff's feelings. *Prentiss v. Shaw*, 56 Me. 427; *Parker v. Coture*, 63 Vt. 155. This is well recognized in the cases of libel and slander, where injury to the feelings causes the larger part of the compensatory damages. *B—— v. I——*, 22 Wis. 372. On the same principle, evidence of malice on the part of the defendant is admitted in aggravation of damages for injury to the feelings. *Hawes v. Knowles*, 114 Mass. 518.

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**THE NEW YORK FRANCHISE TAX.** — In an anxiously awaited decision the New York Court of Appeals, reversing the judgment of the Appellate Division, has sustained the Special Franchise Tax Act, Laws of 1899, c. 712. *People, ex rel. Metropolitan St. Ry. Co., v. State Board of Tax Commissioners*, 174 N. Y. —, (decided April 28, 1903). This statute authorizes the assessment of franchises to operate in "streets, highways, or public places," together with the tangible property used in such places, by the State Board of Tax Commissioners. The franchises and tangible property thus valued are to be subject, as realty, to the regular municipal, county, and state taxes. It was contended by the franchise owners that the assessment by a state board violated the "home rule" provision of the New York Constitution which directs that municipal officers for whose selection the Constitution does not otherwise provide shall be chosen by the electors of the municipality.

In the absence of an express constitutional guarantee of the right of local self-government, the cases are squarely in conflict upon the question of the existence of the right as an unwritten limitation upon the power of the legislature. The right was recognized in *People v. Huribut*, 24 Mich. 44; *contra, State v. Williams*, 68 Conn. 131. But whether the right depends upon express constitutional provision or not, its existence being once recognized, the cases are agreed as to its extent. See 1 DILL. MUN. CORP. 4th ed. § 58 a. The test of the state's power to control municipalities is, broadly speaking, whether the function in question is exercised by the city in its capacity as agent of the state, or in its capacity as agent of its own people, — whether, in short, the function is of general or of merely local interest. *Allison v. Welde*, 172 N. Y. 421; see 15 HARV. L. REV. 848. The application of the test, however, is not always easy.

The reasons assigned for considering the assessment of franchises a matter best dealt with by the state seem adequate. In the first place, in order to secure even an approximation to uniformity throughout the state in the assessment of property of such uncertain value, it is necessary that but one system should be employed. Again, since many companies operate in more than one municipality, state assessment avoids the evils of piecemeal valuation. And finally, control over structures in a highway would seem to follow from the recognized right of the legislature to control the highways themselves. *People v. Flagg*, 46 N. Y. 401. As to the tangible property in the highways, valuation can best be made only in connection with the franchises. The decision relied upon by the Appellate Division would seem not to control. *People v. Raymond*, 37 N. Y. 428. In that case a statute transferring all the functions of municipal tax commissioners to a state board was held unconstitutional. As some features of taxation are clearly of local importance only, that statute, in so far as it affected them, appears rightly to



have been placed on the other side of the line. In addition to being constitutional the Franchise Tax Law seems desirable politically, a quality rather rare in statutes against which the protection of the "home rule" principle has been invoked. See *The Ripper Cases*, 15 HARV. L. REV. 468. Previous to its enactment franchises in New York to the value of \$200,000,000 had escaped taxation owing to the inexperience of the local assessors.

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**MASTER'S DUTY TO KEEP SAFE THE SERVANT'S WORKING PLACE.** — It is well settled that a master is under a non-delegable duty to provide a safe working place for his employees. It is also well settled that he must by proper inspection and repair provide that the place shall not later become unsafe through natural causes. It is not so well settled that there is a similar duty where the subsequent unsafety is due to the acts of the servants themselves in the progress of their work. It is submitted, however, that this third case should be assimilated to the others, and a recent New York decision is authority for that view. Employees engaged under a foreman in excavating, undermined a mass of lime, rendering it unsafe. The plaintiff's decedent sent to work under it was killed. As it appeared that by a reasonably frequent inspection the master could have discovered the danger, he was held liable. *Simone v. Kirk*, 173 N. Y. 7.

In the first two classes mentioned above, if a master delegates to a servant the performance of his personal duty to provide and maintain a safe place for work, as has been seen, he is liable to his other employees for the servant's negligence in performing it. This liability does not arise from the doctrine of *respondet superior*, for, if it did, the fellow servant rule would be a defense. It is rather a part of that public policy which gives rise to the personal duties themselves, — the necessity of protecting human life. It is clear that masters would avoid their personal responsibility, if, by delegating it, they could do so. The rule therefore results that there are certain duties securing safety with regard to the negligent performance of which by his servant a master cannot assert that his other employees have assumed the risk. The reason for the existence of this rule would demand its extension to the third class. The humane policy of protection would come to nothing, if the master, after originally providing a safe place, were allowed to permit the progress of the work to surround the servants with unnecessary dangers.

If the dangers are necessary, however, of course the master is not expected to remove them. This distinguishes the important cases where the master having discovered the danger, a servant is sent to remove it, and is injured. He is held to assume the risk. *Perry v. Rogers*, 157 N. Y. 251; *Murphy v. Boston & Albany*, 88 N. Y. 146. But though the master must remove unnecessary dangers, practical considerations, and many decided cases, show that he cannot be held to remove them at every moment of the work. See *Cullen v. Norton*, 126 N. Y. 1, 6. The idea therefore suggests itself that he should remove them from time to time. A non-delegable duty must be imposed on him to inspect and repair at certain fixed intervals. Such a conception explains most of the cases. Thus in all of the cases not already distinguished which were relied upon to negative the principal case, a sufficient interval had not elapsed since the place became dangerous. It is believed possible to suggest the following rule as consonant with the cases: the master is liable on the basis of his non-delegable duty to provide

a safe working place only in those cases where a definite interval, within which inspection should have been made, has elapsed from the time of the creation of the danger to the time of the injury, the length of this interval to be determined by what is reasonable from the nature of the work. For example, as a usual thing workmen using scaffolding cannot recover against the master for injury due to faulty construction. *O'Connor v. Neal*, 153 Mass. 281. But there comes a time beyond which a master must inspect and himself assume the responsibility for such construction. *Bensing v. Steinway*, 101 N. Y. 547; see also *Gulf, etc., R. R. Co. v. Redeker*, 67 Tex. 181, and *Lovegrove v. London R. R.*, 16 C. B. N. s. 668. These cases, like others, are indeed often explained by well known rules applicable only to the special subject matter. But these rules, even when helpful, are clumsy in justice, and rather rules of thumb than principles of law. The test suggested, however, has an application to the whole subject, and offers an explanation for many otherwise incomprehensible cases. Cf. *Mather v. Rillston*, 156 U. S. 391; and *New England R. R. v. Conroy*, 175 U. S. 323. The principal case is an illustration of its application.

## RECENT CASES.

**AGENCY — AGENT'S RIGHT TO INDEMNITY — PRINCIPAL NOT AT FAULT.** — The plaintiff, a Paris auctioneer, at the request of the defendant in England advertised the latter's mare "Pentecost" for sale. A third person claiming to own the true mare "Pentecost" recovered damages in France from the plaintiff for so advertising. In the present action, brought to secure indemnity for expenses incurred as a result of the French action, it appeared that the defendant's mare was the true "Pentecost." Held, that the defendant company is not liable, since it was not at fault. *Halbrom v. International Horse Agency, etc.*, [1903] 1 K. B. 270.

The court cites no authority for its position, and none has been found. It seems to have been heretofore considered established that a principal must indemnify his agent for all expenses incurred because of the agency. *Frixione v. Tagliaferro*, 10 Moo. P. C. 175; *McArthur v. Campbell*, 2 Ad. & E. 57. This is true even though the agency may have terminated at the time the expense was incurred, and even though the expense was unjustly forced upon the agent by the act of a third party. *D'Arcy v. Lyle*, 5 Binn. 441. This liability does not seem to depend on any wrongful act of the principal, but is rather an incident to the mere relation of principal and agent. *Stocking v. Sage*, 1 Conn. 518. For these reasons the doctrine of the principal case seems difficult to support.

**AGENCY — ATTORNEY AND CLIENT — CONTRACT FOR EXCESSIVE FEE.** — Held, that an attorney's contract with his client for a fifty per cent contingent fee is not necessarily unenforceable on the ground of being unconscionable. *Matter of Mary Fitzsimons*, 174 N. Y. 15.

By the terms of an agreement between an attorney and his client, who was the plaintiff in an action for personal injuries, the attorney was to have fifty per cent of any amount recovered, and the client was to bear all expenses. Held, that this agreement is unconscionable, and therefore not enforceable. *Herman v. St. Ry. Co.*, 48 Oh. L. Bul. 238 (U. S. Circ. Ct., Second Circ.).

The cases were decided independently of any doctrine of champerty. An agreement which an attorney has secured from his client by taking improper advantage of his fiduciary relation will not be enforced. *Gardener v. Ennor*, 35 Beav. 549. But it would seem that a contract which establishes the relation should be governed by different principles. *Dockery v. McLellan*, 93 Wis. 381; see *Stout v. Smith*, 98 N. Y. 25. Since an attorney is entirely free to refuse a retainer, it is difficult, where no question of champerty is involved, to discover any principle by which his right to impose conditions on acceptance should be abridged. *Dockery v. McLellan, supra*. No decision supporting

the federal case has been found. Some courts, however, in sustaining the agreements before them, have failed to distinguish between contracts made before and after the fiduciary relation exists, and have apparently assumed that both would be unenforceable if the compensation were excessive. See *Ex parte Plitt*, Fed. Cas. No. 11,228; *Fellows v. Smith*, 190 Pa. St. 301. Other courts have sustained contracts for a fifty per cent contingent fee without indicating their exact attitude toward the question under discussion. *Taylor v. Bemis*, 110 U. S. 42; *Topeka, etc., Co. v. Root*, 56 Kan. 87.

**AGENCY — MASTER AND SERVANT — DUTY TO PROVIDE SAFE PLACE.** — During the progress of an excavation under the supervision of a foreman, employees undermined and rendered dangerous a large mass of lime. The plaintiff's decedent, sent to work thereunder, was killed. He had been employed subsequently to the undermining of the lime. Sufficient time had elapsed since the creation of the danger for the master to discover it by reasonable inspection. *Held*, that the plaintiff can recover. *Simone v. Kirk*, 173 N. Y. 7. See NOTES, p. 593.

**BANKRUPTCY — DEBTS NOT DISCHARGED — OMISSION FROM SCHEDULE.** — Under § 17 (3) of the Bankruptcy Act all provable debts are discharged "except such as . . . have not been duly scheduled in time for proof . . . unless such creditor had actual . . . knowledge of the proceedings in bankruptcy." The defendant, a bankrupt, knowing that he was liable to the plaintiff on a note, failed to schedule it in the plaintiff's name. The latter had no knowledge of the bankruptcy proceedings until seven months after the adjudication and two months after the discharge. *Held*, that the discharge does not bar the plaintiff's action on the note. Vann, J., dissented. *Columbia Bank v. Birkett*, 174 N. Y. 112.

The court argues that since the present Bankruptcy Act, departing from all previous acts, gives great importance to schedules, an intention is thereby indicated that the creditor should have such knowledge as would enable him to participate in the proceedings. Vann, J., dissenting, maintains that the creditor is barred if he has knowledge in time to prove his claim; that, since under § 57 the plaintiff still had five months, his debt was discharged. The latter interpretation derives some support from the wording of § 17. It accords, also, with the only similar case. *Fider v. Mannheim*, 78 Minn. 309. This view, however, would deprive creditors of many valuable rights given in other parts of the act, such as the right to examine the bankrupt and oppose his discharge, and might even enable a designing debtor whose estate was quickly settled to defeat the creditor's claim entirely. See § 65. The majority unfortunately mention no definite day before which knowledge must be acquired to be material. Yet, considering the whole act, their opinion appears the better.

**BANKRUPTCY — PRIORITY — CLAIMS FOR WAGES.** — The federal Bankruptcy Act, § 64 b, gives priority to claims for wages earned within three months before the commencement of bankruptcy proceedings, not to exceed three hundred dollars in amount; and further, to all debts entitled to priority under the laws of the state. Certain claims for wages not earned within three months of the commencement of the proceedings, were entitled to priority under the New York laws. *Held*, that they are not entitled to priority under the federal act. *In the Matter of Slomka*, 29 N. Y. L. J. 294 (C. C. A., Second Circ.), reversing *In Re Slomka*, 117 Fed. Rep. 688.

For a discussion of the question involved, see 16 HARV. L. REV. 138.

**BILLS AND NOTES — ALTERATIONS BY THE PAYEE — IMPLIED CONSENT.** — The payee of a note in good faith changed the rate of interest from eight per cent, as printed, to seven and one half per cent, the rate really agreed upon by the parties. *Held*, that the payee may recover on the note. *Osborn v. Hall*, 66 N. E. Rep. 457 (Ind., Sup. Ct.).

In general at common law a material alteration of a negotiable instrument renders it void. *Master v. Miller*, 4 T. R. 320. Alteration of the rate of interest is material. *Draper v. Wood*, 112 Mass. 315. This is true although the alteration benefits the party charged. *Coburn v. Webb*, 56 Ind. 100. When an instrument fails to express the real agreement of the parties, some courts hold that it can be reformed only by actual consent or by a court of equity. *Evans v. Foreman*, 60 Mo. 449. But by the weight of authority, alteration to express the real agreement does not render the instrument void, since the assent of the parties may be implied. *Ames v. Colburn*, 11 Gray (Mass.) 390. Technically this doctrine can hardly be defended, but the practical reasons for supporting it are obvious and probably decisive. Thus under such circumstances it seems unfair that a holder in due course should have no recovery. This would be the necessary consequence of holding the instrument void. *Outhwaite v.*

*Luntley*, 4 Camp. 180. The Negotiable Instruments Law, § 124, meets this difficulty by providing that a holder in due course, not a party to the alteration, may enforce payment according to the original tenor of the instrument.

**BILLS AND NOTES—CHECK—PAYEE AS A HOLDER IN DUE COURSE.**—The Massachusetts Negotiable Instruments Law provides that a holder in due course of negotiable paper is one who takes it before maturity, in good faith and for value, with no knowledge of any infirmities in the title of the person negotiating it; and also that a pre-existing debt constitutes value. The drawer of a check gave it to a third person to be delivered to the payee in payment of a debt owed him by the drawer. The third person fraudulently delivered the check as payment of a debt which he himself owed to the payee, the latter accepting it as such payment in good faith. *Held*, that the payee is a holder in due course. *Boston Steel & Iron Co. v. Steuer*, 66 N. E. Rep. 646 (Mass.).

The definition of a holder in due course contained in the Negotiable Instruments Law, adopted by Massachusetts, was taken from the English Bills of Exchange Act. In a widely circulated *dictum* Lord Russell gave it as his opinion that under the latter act a payee could not be a holder in due course. See *Lewis v. Clay*, 67 L. J. Q. B. 224. There appears to be no decision on the point, but this *dictum* was later disapproved in *Herdman v. Wheeler*, [1902] 1 K. B. 361. The interpretation of the statute in the principal case is in accord with the common law doctrine. *Watson v. Russell*, 3 B. & S. 34; *Fairbanks v. Snow*, 145 Mass. 153; *contra*, *Camp v. Sturdevant*, 16 Neb. 693. The best explanation of the situation seems to be that whoever is in possession of a negotiable instrument has the legal right to enforce payment if he is within the tenor of the promise. See *Collins v. Martin*, 1 B. & P. 648. Under this view, the manner of getting possession is material only to decide whether or not the holder has this right free from equitable defenses. In the principal case the payee gave value without notice of infirmities. Therefore he took free of equities and should be allowed to enforce payment as a holder in due course.

**CONFLICT OF LAWS—DIVORCE—BINDING EFFECT OF FOREIGN DECREE UPON PARTY OBTAINING IT.**—The plaintiff and her husband were domiciled in New York. The plaintiff went to Massachusetts, acquired a *bona fide* domicile there, and obtained a divorce. The husband in New York was served with personal summons, but did not appear in the suit. Upon the husband's death the plaintiff brought an action in New York for dower in his lands situated in that state. *Held*, that the plaintiff cannot question the Massachusetts decree. *Starbuck v. Starbuck*, 173 N. Y. 503.

The court considers the Massachusetts decree not binding in New York, but justifies its decision on the ground that a plaintiff who has invoked the jurisdiction of a foreign court cannot later question the validity of its decree for lack of jurisdiction. This is well recognized where the elements of equitable estoppel are present, as where alimony has been accepted. *Ellis v. White*, 61 Ia. 644. In the absence of estoppel there seems to be little authority outside of New York in support of the court's proposition. The cases cited to sustain it either involve equitable estoppel or rely on cases which involve it. *Daniels v. Tearney*, 102 U. S. 415; *Arthur v. Israel*, 15 Col. 147. On principle, also, the position seems doubtful. Recovery is denied in a case where, on the court's assumption that the decree is ineffective, no legal defense exists, and where the defendant seems not to have been so injured by the plaintiff's conduct as to be entitled to an injunction restraining her from enforcing her legal rights. The result of the case may well be supported, however, on the ground that the Massachusetts decree was binding on the New York court. See *Atherton v. Atherton*, 181 U. S. 155; 15 HARV. L. REV. 66.

**CONFLICT OF LAWS—ENFORCEMENT OF FOREIGN OBLIGATION—OBLIGATION IN EFFECT PENAL.**—An Illinois corporation sold goods to X while he and his wife, citizens of Massachusetts, were temporarily in Illinois. By a statute of Illinois both husband and wife, or either of them, are made liable for family expenses. The corporation sued the wife in Massachusetts. *Held*, that the action cannot be maintained. *Mandell Brothers v. Fogg*, 66 N. E. Rep. 198 (Mass.).

Among the exceptions to the rule that foreign-created rights will be enforced is the rule that a state will not enforce penal obligations created in another. If the obligation is more than mere compensation for injury done the plaintiff, generally speaking, it will not be enforced in another state. Thus a foreign obligation to support a bastard child will not be enforced. *Graham v. Monsergh*, 22 Vt. 543. Nor an obligation to support a son-in-law. *De Brimont v. Penniman*, 10 Blatch. (U. S. Cir. Ct.) 436. It would seem that the principal case should fall within the exception. The law of community of

goods does not exist in Illinois; nor is the statute, under which the claim in the principal case is made, a community statute. It makes a charge not on common property but on separate property. Since the husband is by law liable for the debts of the family in any event, this statute, which puts a new burden on the wife in the interest of the husband's creditors, is in the nature of a penalty.

**CONSTITUTIONAL LAW — EMINENT DOMAIN — WHAT CONSTITUTES A "TAKING."** — A dam was erected under the authority of Congress for the improvement of a harbor. Land of the plaintiff, an upper riparian owner, was permanently flooded by the higher level of the river, preventing drainage from the land. The plaintiff sued the United States. *Held*, that he can recover. *United States v. Lynch*, 23 Sup. Ct. Rep. 349.

Property cannot be taken without compensation, although the act be done under the power of Congress to regulate commerce. *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312. *Cf. Peart v. Meeker*, 45 La. Ann. 421. The federal courts under the Fifth Amendment are not bound by state decisions as to what is a "taking" of property. See 14 HARV. L. REV. 457. But no definite federal rule has been laid down. The Supreme Court seems to recognize that a physical taking of property is not essential. See *Pumpelly v. Green Bay Co.*, 13 Wall. 166. Recovery for certain "incidental" damage, however, as where navigable access to the plaintiff's land was destroyed, has been refused. *Scranton v. Wheeler*, 179 U. S. 141. The three dissenting judges thought the damage in the principal case incidental. Physical damage to the land, however, did exist. The flooding, moreover, was as proximately caused as if water had been directly flowed upon the land, and under the latter circumstances the court would have allowed recovery. See *Pumpelly v. Green Bay Co.*, *supra*. The decision accordingly seems correct.

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TERMINI OF ROUTE WITHIN STATE.** — The plaintiff, a railroad connecting two points in Arkansas, ran for a distance in Indian Territory. The defendants, railroad commissioners of Arkansas, attempted to fix the rates for the haul, and the plaintiff sought to enjoin their action. *Held*, that the carriage between the two points is interstate commerce and the injunction will be granted. *Hanley et al. v. Kansas City Southern Ry. Co.*, 23 Sup. Ct. Rep. 214.

The point presented in the principal case is here for the first time decided by the Supreme Court. It has, however, arisen several times in state courts, the decisions being about equally divided. *Accord, Sternberger v. Cape Fear & Y. V. R. R. Co.*, 29 S. C. 510; *contra, State v. Western Union Tel. Co.*, 113 N. C. 213. The state decisions opposed to the principal case follow a *dictum* of the Supreme Court, which considered the commerce domestic in sustaining, under a similar set of facts, a tax upon receipts proportionate to the mileage within the state. *Lehigh Valley R. R. v. Penn.*, 145 U. S. 192. Such a tax, however, has been held constitutional as a franchise tax, even where the commerce was admittedly interstate. *Maine v. Grand Trunk Ry.*, 142 U. S. 217. Moreover, a vessel which on a voyage between two ports of the same state passed more than a marine league from shore was held to be engaged in interstate commerce. *Pac. Coast S. S. Co. v. R. R. Commissioners*, 18 Fed. Rep. 10. The principal case, then, in making material the route as well as the destination adopts the usual liberal construction of the interstate commerce clause. See *The Daniel Ball*, 10 Wall. (U. S. Sup. Ct.) 557. Since, if this commerce is not interstate, there would be no power to prevent interference by the neighboring state, the result seems desirable upon practical grounds.

**CONSTITUTIONAL LAW — MUNICIPAL HOME RULE — STATE ASSESSMENT OF FRANCHISES.** — The Constitution of New York directs that all municipal officers whose selection is not otherwise provided for shall be chosen by the electors of the municipality. N. Y. Const., Art. 10, § 2. A New York statute, Laws of 1899, c. 712, provides that a state board shall assess franchises to operate in streets, highways, and public places, together with the tangible property therein. *Held*, that the statute is constitutional. *People, ex rel. Metropolitan Street Ry. Co. v. Tax Commissioners*, 174 N. Y.—, (decided April 28, 1903). See NOTES, p. 592.

**CONSTITUTIONAL LAW — MUNICIPAL OWNERSHIP — FUEL PLANTS.** — In reply to questions submitted by the legislature, the Supreme Court of Massachusetts delivered an advisory opinion that proposed legislation authorizing cities and towns to establish and operate fuel yards would be constitutional only when limited to meeting an emergency in which government agencies alone could procure fuel. *In re Municipal Fuel Plants*, 66 N. E. Rep. 25 (Mass.). See NOTES, p. 584.

**CONTRACTS — ACCORD AND SATISFACTION — PAYMENT OF LIQUIDATED DEBT BY NOTE FOR SMALLER AMOUNT.** — A recovered judgment against B for two hundred and twenty-six dollars. Nothing was obtained on the execution issued. A thereupon accepted fifty dollars in cash and B's unsecured note for fifty dollars, agreeing that the debt should be fully discharged if the note were paid at maturity. B paid the note at maturity and A gave a receipt in full. *Held*, that the judgment debt has not been discharged. *Shanley v. Koehler*, 80 App. Div. 566.

Apart from statute a smaller sum accepted in full payment of a liquidated debt does not discharge the debt, since there is no consideration for the surrender of the balance. *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Weber v. Couch*, 134 Mass. 26. *Contra*, *Clayton v. Clark*, 74 Miss. 499. The decision in the principal case is based on this rule, for it is difficult to consider the payment of the note at maturity more valuable than the immediate payment of the same amount. But it has been generally recognized that a present payment may in fact be of more value than a mere claim for a larger sum. See *Foakes v. Beer*, L. R. 9 App. Cas. 605, 617, 622; 12 HARV. L. REV. 525, n. 1. The general rule has consequently been greatly limited by technical distinctions. Thus the debtor's payment of a part of the debt and of the costs of a prior action for its enforcement has been held sufficient, although the total sum paid was less than the debt. *Mitchell v. Wheaton*, 46 Conn. 315. Similarly many courts hold that the debtor's unsecured paper for a smaller amount may constitute a discharge if honored at maturity. *Sibree v. Tripp*, 15 M. & W. 23; *Wells v. Morrison*, 91 Ind. 51. *Contra*, *Siddall v. Clark*, 89 Cal. 321. In the principal case, therefore, it would seem that the court might have reached an opposite and more desirable conclusion.

**CONTRACTS — ANTICIPATORY BREACH — INSURANCE CONTRACT.** — The plaintiff was insured for \$5000 by the defendant corporation. The defendant decided to limit the amount payable upon existing certificates to \$2000. Accordingly, it refused to recognize the plaintiff's original contract or to accept premiums under it. The plaintiff sued the defendant for breach of contract. *Held*, that, since the defendant was by the terms of its contract called upon to pay only on the death of the plaintiff, there was no breach. *Langan v. Supreme Council, Am. Legion of Honor*, 174 N. Y. 266.

It has been thought that New York had virtually adopted the anticipatory breach doctrine. See 14 HARV. L. REV. 433, n. 4. The doctrine, however, has never been necessarily recognized, though there are numerous *dicta* to that effect. The one case of a marriage contract is to be distinguished on the ground that there was a breach of an actual implied promise to act consistently with the marriage contract. *Burtis v. Thompson*, 42 N. Y. 246. On the other hand, it has been said that an action will not lie at once when the maker of a promissory note declares before its maturity that he will not honor it. See *Benecke v. Haebler*, 38 N. Y. App. Div. 344. On principle this would seem to be an anticipatory breach, though the doctrine would probably nowhere be applied to such a case. The contract of insurance, being merely to pay money in the future, might be thought analogous to the case of a promissory note. But if not within that exception, the principal case clearly presents an anticipatory breach, and is therefore inconsistent with the existence of that doctrine in New York.

**CONTRACTS — CONSTRUCTION — PRESUMPTION AS TO PLACE OF PERFORMANCE.** — The defendant contracted in Kentucky to employ the plaintiff for two years as superintendent of his factory, the written agreement not stating the place of performance. Before the expiration of two years, the factory was moved from Kentucky to Indiana. The plaintiff refused to superintend the business there, and, upon the defendant's refusal to pay his salary, brought an action for breach of contract. *Held*, that there is a *prima facie* presumption that the contract is to be performed in the state in which it is made. *Cook v. Todd*, 72 S. W. Rep. 779 (Ky.).

The doctrine that such a presumption exists seems to have originated with those courts which hold that a contract must be construed according to the law of the jurisdiction in which it is to be performed. *De Sobry v. De Laistre*, 2 H. & J. (Md.) 191. To determine the place of performance when the contract itself contains no expression of intention, this presumption was introduced. Since the presumption is not calculated to give effect to the intention of the parties, the difficulty might have been met more satisfactorily by holding directly that a contract silent as to the place of its performance will be construed according to the law of the jurisdiction in which it was made. See *Mittenthal v. Mascagni*, 66 N. E. Rep. 425 (Mass.). The use of this presumption, as in the principal case, not to decide a question of jurisdiction, but to determine the substantive rights of the parties, seems peculiarly unfortunate. If the terms of a written contract when interpreted by the aid of such evidence as is properly admissible do not indicate the intention of the parties as to the place of performance, there seems to be no reason for narrowing the scope of those terms by an arbitrary presumption.

**CONTRACTS — ILLEGAL CONTRACTS — OUSTING COURT OF JURISDICTION.** — A contract was made in Italy by the defendant, who was an Italian citizen, and the plaintiff, an American who elected in the contract to have an Italian domicile. To an action on the contract brought in Massachusetts the defendant pleaded in abatement an express stipulation that the contract was to be sued on only in Florence, Italy. *Held*, that since this stipulation is neither unreasonable nor against public policy it is a good plea. *Mittenthal v. Mascagni*, 66 N. E. Rep. 425 (Mass.).

The decision is in accord with the only authorities which have been found. *Giennar v. Meyer*, 2 H. Bl. 603; *Johnson v. Mackielsne*, 3 Camp. 44. These cases go on the ground that parties may contract to waive the right to appeal to the courts in one jurisdiction if they retain the right to sue in another, provided the contract is reasonable. The same principle appears in those cases which allow an insurance company to limit suit on a policy to one state or county. *Daley v. People's Building Association*, 178 Mass. 13; *Greve v. Aetna Live Stock Ins. Co.*, 81 Hun (N. Y.) 28. Similarly parties may by express agreement bar an action within a period shorter than the statute of limitations. *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.) 596; *Matter of Petition of N. Y., etc., R. R. Co.*, 98 N. Y. 447. The doctrine of the principal case seems, however, somewhat opposed to the underlying principle of the well established rule that an agreement to arbitrate can be enforced only when in the form of a condition precedent to liability on the contract. *Scott v. Avery*, 5 H. L. Cas. 811. Since it carries out the intention of the parties and encourages freedom of contract, the doctrine of the principal case seems to be the desirable one.

**CONTRACTS — INTERPRETATION — CHANGE OF RULES OF SOCIAL CLUB.** — The constitution of a social club contained no provision for its amendment, but had been frequently amended by majority vote before the plaintiff joined the club. An amendment raising the annual dues having been adopted without the plaintiff's consent, he refused to pay the additional amount, and sought an injunction against interference with his enjoyment of the club's privileges. *Held*, that the injunction will be granted. *Harington v. Sendall*, 19 T. L. R. 302 (Eng., Ch. D.).

A club is analogous to a partnership in that both the constitution of the one and the articles of agreement of the other are obligatory only as contracts. See *Austin v. Searing*, 16 N. Y. 112, 121. In partnership cases it is held within the implied terms of the contract that with regard to acts within the ordinary scope of the business the majority shall prevail. *Peacocks v. Chambers*, 46 Pa. St. 434. But unanimity is essential to the validity of acts repugnant to, or in alteration of, the contract of partnership. *Appeal of Jennings*, 16 Atl. Rep. 19 (Pa.). Apart from special circumstances, the same principles would seem to be decisive of the principal case. If, however, the plaintiff had known of the usage of the club to abide by the will of the majority in all cases, that usage would impliedly have been part of the contract of membership. See *Loring v. Gurney*, 5 Pick. (Mass.) 15; 2 GREENL. EV. 16th ed. § 251. But it is well settled that a party to a contract is not bound by a particular usage of which he had no knowledge at the time of contracting. *Gabay v. Lloyd*, 3 B. & C. 793. Accordingly, the decision in the principal case appears sound.

**CORPORATIONS — STOCKHOLDER'S RIGHT TO VOTE — INTEREST OF DIRECTOR.** — Directors were privately interested in a loan to the corporation. The required vote of two-thirds of the stockholders in accepting the loan could not have been attained without the votes cast by the interested directors. *Held*, that the transaction will not be set aside at the suit of a minority shareholder. *Hodge v. U. S. Steel Corp.*, 54 Atl. Rep. 1 (N. J., C. A.). See NOTES, p. 585.

**DAMAGES — PROVOCATION IN MITIGATION OF COMPENSATORY DAMAGES.** — The defendant assaulted the plaintiff because of the publication by the latter of an article concerning the defendant. *Held*, that evidence of the provocation may be considered in mitigation of the damages actually suffered by the plaintiff. *Genung v. Baldwin*, 77 N. Y. App. Div. 584. See NOTES, p. 591.

**DAMAGES — TROVER — SEVERANCE OF COAL FROM THE REALTY.** — The defendant by a non-negligent mistake mined coal in the plaintiff's land. The plaintiff brought trover. *Held*, that the measure of damages is the value of the coal immediately after severance. *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.*, 33 So. Rep. 547 (Ala.). See NOTES, p. 589.

**EQUITY — INJUNCTION — PATENT PUT TO ILLEGAL USE.** — The plaintiff sought to enjoin the defendant from infringement of his patent on detectors of bogus coins. The defendants established that the plaintiff used these detectors exclusively to guard



gambling-machines. *Held*, that plaintiff is entitled to an injunction. *Fuller v. Berger*, 120 Fed. Rep. 274 (C. C. A., Seventh Circ.).

This case was discussed before its appearance in the regular reports at p. 444 *ante*.

**EQUITY—PROTECTION OF CONTRACT RIGHTS—INJUNCTION AGAINST STRIKERS.**—A coal agency, having large contracts both for the purchase of coal from mine owners and for its delivery to customers, filed a bill to restrain the continuance of a strike in the mines, in which the strikers, by intimidation, were unlawfully preventing others from working. The defendants demurred. *Held*, that the injunction will be granted. *Chesapeake, etc., Co. v. Fire Creek, etc., Co.*, 119 Fed. Rep. 942 (Circ. Ct., W. Va.).

If the interference with the plaintiff's contract, or, in the United States, with his "business expectancies" had been malicious, though otherwise lawful, it would have given rise to an action at law or an injunction in equity. *Lumley v. Gye*, 2 E. & B. 216; *Plant v. Woods*, 176 Mass. 492. Where the act which is the legal cause of the plaintiff's injury is tortious *per se*—as here—the necessity of malice to connect the defendant's act with the injury is done away with. Thus, had this action been at law the plaintiff would undoubtedly have recovered. *Bowen v. Hall*, L. R. 6 Q. B. D. 333. Logically, therefore, as irreparable injury was alleged, an injunction should lie. The case, which is one of first impression on this exact point, is undoubtedly sound, not as an extension, but as a novel application, of recognized legal and equitable principles.

**INSURANCE—ACCIDENT INSURANCE—RIGHT OF INSURER TO SUBROGATION.**—In an action against an accident insurance company to recover agreed compensation for time lost by the insured because of an injury sustained through the negligence of a railroad, the defendant sets up that the plaintiff had released the railroad from liability. *Held*, that the defendant had no right of subrogation and so was not prejudiced by the release. *Aetna Life Ins. Co. v. Parker & Co.*, 72 S. W. Rep. 168 (Tex., Sup. Ct.).

In fire insurance, the insurer is subrogated, on payment of a loss, to the insured's right of action against a tortfeasor who may have caused the fire. *Mason v. Sainsbury*, 3 Doug. 61. In life and accident insurance, however, there can be no subrogation if, as is commonly said, the contract is not for indemnity as in fire insurance, but simply to pay a fixed sum on the happening of a certain event. See *Phoenix Mut. Life Ins. Co. v. Bailey*, 13 Wall. (U. S. Sup. Ct.) 616. But in fact life and accident policies appear to be valued indemnity policies. MAY, *INS.* 4th ed. § 7. This conception, however, does not necessarily involve the introduction of subrogation, in life insurance at least. For death is the subject of such conjectural pecuniary compensation that in no case can it be said that the insured is more than fully indemnified; consequently subrogation has no place. See *Burnand v. Rodocanachi*, L. R. 7 App. Cas. 333; *contra*, *The St. Johns*, 101 Fed. Rep. 469. Accident insurance would be a more likely field for the application of subrogation, particularly in cases like the one under consideration, where the injury can be measured with comparative ease. But the so-called *wager view* of life and accident insurance is so firmly fixed that subrogation will probably be denied here too. There is no precise authority on the point. But two cases have been found holding that in an action by the insured for his own benefit the tortfeasor cannot plead the payment of the insurance in mitigation of damages. *Bradburn v. Great Western R. R. Co.*, L. R. 10 Ex. 1; *Harding v. Town of Townshend*, 43 Vt. 536.

**INSURANCE—RESCISSION OF CONTRACT—PLACING INSURER IN STATU QUO.**—The plaintiff took out a life insurance policy in a mutual benefit association for five thousand dollars. Some years later the association repudiated the contract in part by passing a by-law making two thousand dollars the maximum amount payable on any policy. *Held*, that the plaintiff may rescind the contract and recover in full the amount of the assessments paid. *Black v. Sup. Council, Am. Legion of Honor*, 120 Fed. Rep. 580 (Circ. Ct., E. D. Pa.).

As conceded in the principal case, the right of rescission depends upon the ability to place the defendant in *statu quo*. *Gassett v. Glasier*, 165 Mass. 473. The court held this requirement satisfied on the ground that the insurer had suffered no material detriment, the insured being still alive. This view is supported by the weight of authority. *Van Werden v. Equitable Life Assur. Co.*, 99 Ia. 621; *Am. Life Ins. Co. v. McAden*, 109 Pa. St. 399. According to the better view, however, rescission is not allowed, since the consideration for the assessments is the risk assumed by the insurer. *Cont. Life Ins. Co. v. Houser*, 111 Ind. 266; *Phoenix Mut. Life Ins. Co. v. Baker*, 85 Ill. 410. In the case of fire insurance it is universally recognized that the consideration is the risk.

*Am. Ins. Co. v. Garrett*, 71 Ia. 243. It is submitted that the certainty of a future loss, which is the only distinguishing characteristic of life insurance, does not destroy the value of the past assumption of risk. It would seem, therefore, that, if the defendant is deprived of remuneration for such risk, he is not left in *statu quo*. Furthermore rescission is not necessary to protect the plaintiff. The federal courts accept the doctrine of anticipatory breach. *Rothm v. Horst*, 178 U. S. 1. Hence the plaintiff could maintain an action for his actual damage. *Union Cent. Life Ins. Co. v. Poettker*, 5 Big. Ina. Rep. (Oh.) 449. See *Phoenix Mut. Life Ins. Co. v. Baker*, *supra*; cf. *Langan v. Supreme Council, etc.*, *supra*, p. 598.

INTERNATIONAL LAW — STATUS OF CUBA DURING UNITED STATES MILITARY OCCUPATION. — A murder was committed on a vessel sailing under a registry issued at Havana by the American military government. *Held*, that the United States courts have no jurisdiction over the offense, since the vessel was an extension of a "foreign country." *United States v. Assia*, 118 Fed. Rep. 915 (Circ. Ct., E. D. N. Y.). See NOTES, p. 213.

This case was discussed before it appeared in the regular reports at p. 213 *ante*.

PRACTICE — APPOINTMENT OF AUDITOR IN JURY TRIAL — COSTS. — Because of complexity in the defendant's case the court of its own motion, but with the consent of the parties, appointed an auditor to make a tentative investigation in preparation for trial by the jury. The defendant paid half of the expense. Upon the plaintiff's submitting to a nonsuit, the court refused to allow the defendant to include this amount in his costs. *Held*, that, when the court, in the exercise of its inherent power to secure the attainment of justice in a jury trial, appoints an auditor it may distribute the costs in the most equitable manner. *Fenne v. Primrose*, 119 Fed. Rep. 801 (C. C. A., First Circ.).

It is generally held that a court cannot appoint an auditor without the consent of the parties, if he is to decide finally issues of fact. See Note, 79 Am. Dec. 207. *Contra*, *Davis v. St. Louis, etc., Ry. Co.*, 25 Fed. Rep. 786. But when he is merely to hold a tentative examination his appointment would seem to be within the power of the court. Certainly the right of trial by jury is not infringed, the reaching of a just verdict merely being rendered more easy. No case has been found which considers the precise point, but the reasoning of one decision is in support of the principal case. See *Lawrence's Cases*, 6 Ct. of Cl. 79. In exercising its discretion as to the costs, the court would seem to be following established precedents. *Nashua & Lowell R. R. Corp. v. Boston & Lowell R. R. Corp.*, 61 Fed. Rep. 237; see *Spalding v. Mason*, 161 U. S. 375, 397. Since in the principal case the reference was with the consent of the parties, the court might well have rested the decision on the established ground that, in the absence of statute, the court may let the expense lie where it falls. *New Hampshire Land Co. v. Tilton*, 29 Fed. Rep. 764.

PROPERTY — FIXTURES — MORTGAGE OF LAND. — The plaintiff rented a number of theatre seats to the owner of a hippodrome for a specified period, the agreement containing a provision for purchase. The seats, as required by local regulations, were firmly fastened to the floor. Later the hippodrome and fixtures were mortgaged to the defendant, who sold the seats. The plaintiff, thereupon, brought an action of trover. *Held*, that the plaintiff may recover, since he was never divested of his title to the chairs. *Lyon & Co. v. London, etc., Bank*, 114 L. T. 477 (Eng., K. B.).

This decision seems opposed to the previous English cases. *Hobson v. Gorringe*, [1897] 1 Ch. 182. For a discussion of the principles involved, see 10 HARV. L. REV. 190; 16 *ibid.* 531.

PROPERTY — PERPETUITIES — INFANT EN VENTRE SA MÈRE. — The testatrix devised real property to trustees on trust to pay the income to her daughter Y for life, and after her death on trust for the third and every younger son of Y for his life, with remainder upon trust for his first and other sons successively in tail male. Y's third son, the present plaintiff, was born four months after the death of the testatrix. The plaintiff on reaching his majority took out a summons for a declaration that the estates after his life estate were invalid. *Held*, that the subsequent estates to the plaintiff's sons are well devised. *Re Wilmer*, 47 Sol. Jour. 336 (Eng., Ch. D.).

It is a general rule that an infant *en ventre sa mère* will be regarded as born if it is for his benefit. *Doe d. Clarke v. Clarke*, 2 H. Bl. 399. More recently the rule has been extended to cover a case in which considering the infant born would benefit another, and not be detrimental to the infant himself. *In re Burrows*, [1895] 2 Ch. 497. But where the child's interest would be unfavorably affected, the courts have refused to

consider him born. *Blasson v. Blasson*, 2 De G. J. & S. 665. If, in the principal case, the infant be considered not born at the death of the testator, the estates after that of the plaintiff are void for remoteness and the Court of Chancery would construe the will to give the plaintiff an estate tail. Cf. *Humberston v. Humberston*, 1 P. Wms. 332. This he could convert into an estate in fee by a disentailing assurance. It appears then that it is distinctly to the plaintiff's detriment to hold that he was born at the death of the testator. Though it is generally assumed that within the rule against perpetuities a child *en ventre sa mère* is always considered born, it has never been expressly held where there was detriment to the infant. This case is therefore noteworthy.

**RES JUDICATA—SUIT FOR BREACH OF TRUST—RIGHTS OF CESTUI NOT PARTICIPATING.**—The plaintiff, one of several *cestuis que trustent*, had been joined as co-defendant in a suit brought by another of the *cestuis que trustent* against the trustees for breach of trust. The plaintiff had not appeared in answer to the summons. Only the rights of those *cestuis* who appeared had been passed upon, and a decree for an accounting to them had been issued. The plaintiff now brought suit against the executors of the last surviving trustee for the same breach of trust. *Held*, that he is not barred by the decree in the former suit. *Earle v. Earle*, 173 N. Y. 480.

It is frequently stated that as between parties and their privies a judgment is conclusive as to every matter which might have been litigated in the action. See *Jordan v. Van Epps*, 85 N. Y. 436. A more exact statement would seem to be that neither party to an action can decline to meet an issue tendered him by the other and then maintain that it has not become *res judicata*. See *Malloney v. Horan*, 49 N. Y. 111; *FREEMAN*, JUDGE, 4th ed. § 249. In the principal case the plaintiff and defendant were in no proper sense adverse parties in the former suit, for no claim of the plaintiff against the defendant was passed on by the court. The rights actually settled in the former suit were those of the *cestuis* who appeared, and the plaintiff does not now seek to disturb the adjudication of those rights. Accordingly the decision would appear to be sound.

**RES JUDICATA—SUIT FOR CUSTODY OF INFANT—PRIOR DETERMINATION NOT ON MERITS.**—A mother filed a petition against her former husband, alleging generally that he was unfit to control their child, and praying that he might be required to deliver the child to the petitioner. The father pleaded that a former petition of the mother had been dismissed on demurrer. *Held*, that a demurrer to this plea must be sustained. *Pearce v. Pearce*, 33 So. Rep. 883 (Ala.).

In the United States it is generally held that a decision adverse to the petitioner in a writ of *habeas corpus* does not prevent him from bringing a new writ on the same facts. *People, ex rel. McIntyre*, 67 How. Pr. (N. Y.) 362; *contra*, *In re Hammil*, 9 S. Dak. 390. The reason usually given is that an order remanding to custody may not be appealed from, and therefore cannot be considered final. *Russell v. Commonwealth*, 1 P. & W. (Pa.) 82. But *habeas corpus* proceedings for the custody of an infant are in effect a suit between the claimants of the infant. On this ground it is generally held that in such a case an order remanding to custody is conclusive concerning the facts on which it is based. *Mercein v. People*, 25 Wend. (N. Y.) 64. For this reason such an order may be appealed from. See *McConologue's Case*, 107 Mass. 154, 170. By analogy to similar *habeas corpus* cases a decree in divorce proceedings awarding the custody of a child to the mother has been held *res judicata* as to the facts on which it was based. *Du Bois v. Johnson*, 96 Ind. 6. In these cases, however, the paramount consideration should be the well-being of the infant. See *Mercein v. People*, *supra*. Accordingly the principal case may be defended, for the first dismissal was not a decision on the merits. Cf. *Verser v. Ford*, 37 Ark. 27.

**SALES—IMPLIED WARRANTY OF MERCHANTABILITY—LATENT DEFECTS.**—The plaintiff was poisoned by beer which he bought from the defendant, a tavern-keeper, who in turn had bought it from a brewer. The poison which the beer contained, owing to defective brewing, could have been detected only by a skilful chemical test. *Held*, that under the Sale of Goods Act the defendant is liable on an implied warranty that the beer was fit to drink. *Holt v. Wrenn*, 19 T. L. R. 292 (Eng., C. A.). See NOTES, p. 590.

**SALES—STATUTE OF FRAUDS—TRANSFER OF CHOSE IN ACTION.**—The plaintiff declared on the breach of an oral contract by which the defendant had agreed to purchase a debt due the plaintiff from a third person. The defendant demurred on the ground that the contract was void as a sale of goods, wares, and merchandise within

the Statute of Frauds. Held, that the demurrer must be sustained. *French v. Schoonmaker*, 54 Atl. Rep. 225 (N. J., Sup. Ct.).

In England it is settled that a contract for the sale of a chose in action is not within § 17 of the Statute of Frauds. *Humble v. Mitchell*, 11 Ad. & E. 205. In this country, however, the statute is generally construed to include all securities which are commonly transferred in a tangible form; for example, bonds and shares of stock. *Greenwood v. Law*, 55 N. J. Law 168; *Tisdale v. Harris*, 37 Mass. 9. This view seems within the spirit of the statute, since the transfer of such securities is essentially the same as the transfer of ordinary goods and merchandise. But to ordinary choses in action the courts have generally refused to extend this rule. *Somerby v. Buntin*, 118 Mass. 279. Only one decision has been found which supports the principal case. *Walker v. Supple*, 54 Ga. 178; virtually overruled by *Rogers v. Burr*, 105 Ga. 432. An ordinary chose in action apparently is not within the words of the statute. For this reason several states have specifically included choses in action in their statutes of frauds. See WOOD, STAT. FRAUDS, § 283. In the absence of such express provision it is difficult to support the principal case.

**SALES — TRANSFER OF TITLE — PRESUMPTION WHEN SOMETHING REMAINS TO BE DONE.** — An action was brought for the price of certain wood which was to be measured by the buyer to ascertain the exact price. Held, that title has not passed. *Porter v. Bridgers*, 43 S. E. Rep. 551 (N. C.). See NOTES, p. 587.

**TAXATION — EXEMPTIONS — PROPERTY OF CHARITABLE INSTITUTION USED FOR REVENUE.** — A statute provides for the exemption from taxation of "buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof." Held, that lands held by a charitable institution as a part of its endowment, and not used directly in the institution's work, are not exempt. *Cooper Hospital v. City of Camden*, 54 Atl. 419 (N. J., C. A.), overruling *Cooper Hospital v. Burdsall*, 63 N. J. Law 85.

For a discussion of the principles involved, see 16 HARV. L. REV. 70.

**TORTS — ABATEMENT — NEGLIGENCE OF SOLICITOR.** — An action was brought by a former client against a solicitor for damage caused by the latter's negligence. The defendant died before trial. Held, that the cause of action survived. *Davies v. Hood*, 114 L. T. 313 (Eng., K. B.).

By the old common law, while contract actions survived if primarily concerning property, tort actions, including assumpsit, did not. See 1 SAUND. 216, note. But the tendency has constantly been to allow more actions to survive, through assumpsit becoming a contract action and through the extension of the scope of contracts implied in fact. See *Stimpson v. Sprague*, 6 Me. 470. Now the form of action is not generally considered as material; and hence if the action, though brought in tort, is one where there was also contractual liability, it will in general survive. *Lee's Admr. v. Hill*, 87 Va. 497. Modern statutes provide that tort actions for injuries to property shall survive either the defendant's or plaintiff's death. See *Miller v. Young*, 90 Hun (N. Y.) 132; *Cotter v. Plumer*, 72 Wis. 476. The principal case therefore accords with the modern cases decided under statute. *Tichenor v. Hayes*, 41 N. J. Law, 193. It would seem, however, that the result ought to be the same independently of statute, since assumpsit would lie here on an implied promise. *Varnum v. Martin*, 32 Mass. 440. There are, however, *dicta* to the contrary. See *Elder v. Bogardus*, Hill & Den. Supp. (N. Y.), 116, 119.

**TORTS — LIBEL — PLEADINGS ABSOLUTELY PRIVILEGED.** — The plaintiff's declaration stated that the defendant had in his pleadings in a previous action alleged falsely and with actual malice that the plaintiff, a stranger to the action, had voted illegally. The allegation was pertinent to the issue in that case. Held, that the allegation is absolutely privileged. Wilkes, J., dissented. *Crockett v. McLanahan*, 72 S. W. Rep. 950 (Tenn.).

The general rule is that statements in pleadings are absolutely privileged when pertinent to the issues. *Runge v. Franklin*, 72 Tex. 585; *Link v. Moore*, 84 Hun (N. Y.) 118. An exception to this rule has heretofore been recognized as existing in Tennessee, where it has been held that allegations with reference to one not a party to the action are only conditionally privileged. *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395. No other jurisdiction appears to have adopted the distinction. See *Jones v. Brownlee*, 161 Mo. 258. Wilkes, J., dissenting, supports the former Tennessee rule on the theory that, since the parties control the framing of the issues, they can so shape the case as to libel anybody with impunity if there is no exception in favor of third parties. Judges

generally, however, have considered that, even though the privilege may at times be abused, yet public policy requires that judicial investigations should not be hampered by fears of groundless libel suits against those involved in the proceedings. On the whole the latter view seems preferable. Accordingly the principal case appears sound in bringing Tennessee into line with other jurisdictions.

**TRUSTS—DISTINCTION BETWEEN PERSONAL AND REPRESENTATIVE CAPACITY OF TRUSTEE.**—*Held*, that a judgment in a foreclosure suit against a party not described as a trustee does not prevent him from setting up in a subsequent action a claim as trustee to the property in question. *Farmers' Loan and Trust Co. v. Essex*, 71 Pac. Rep. 268 (Kan.).

In an action brought for the assessment of taxes upon lands owned by the defendant, she was described as "trustee of A. H." The land was in fact owned by the defendant in her own right. *Held*, that taxes may be assessed against the land in the present action, for the reason that the words "trustee of A. H." are merely descriptive, and consequently the defendant is present in her individual capacity. *Commonwealth v. Hamilton*, 72 S. W. Rep. 744 (Ky.). See NOTES, p. 588.

## BOOKS AND PERIODICALS.

**DISEASE OF DEFENDANT AS DEFENSE TO ACTION ON CONTRACT TO MARRY.**—In a recent article some space is given to a discussion of venereal disease in defendant as a defense to an action for breach of promise to marry. *Venereal Disease in the Law of Marriage and Divorce*, by Charles Henry Huberich, 37 Am. L. Rev. 226 (March-April, 1903). The difficulties of the question are in part suggested, but no explanation is attempted. The writer does little more than cite extracts from one English and two American cases, which he seems to consider the entire law on the subject.

The author's discussion is involved in the broader question as to how far disease in general in a party to a contract of marriage will justify his refusal to perform. The possible cases would seem to fall into two general classes. In the first would come cases where the disease materially affects the health of defendant, the party refusing to perform, without making sexual intercourse dangerous to either party or impossible. In these cases there would seem to be no defense. Such a change in defendant's health may be imagined as would excuse plaintiff from performing, but, if the latter is willing, the defendant, it would seem, must perform or pay damages. In the second class would fall cases in which the disease would render intercourse dangerous to one party or impossible. In this class it will be convenient to make four subdivisions.

(a) The existence of such disease may be known to defendant at the time of contract, but he may have had reasonable ground to believe that it could easily be cured. In this case there would seem to be a valid defense provided the court would protect him were the disease unknown, as in subdivision (d). See *Allen v. Baker*, 86 N. C. 91.

(b) But there may be no reasonable ground for believing that the disease is temporary in its nature, and in this case, on the analogy of the cases in which a married man is held liable when he contracts to marry a single woman, there would seem to be no defense. Cf. *Kelley v. Riley*, 106 Mass. 339.

(c) Where such disease does not exist at the time of contract but its subsequent appearance is due to defendant's fault, there would seem to be no ground for a defense.

(d) But the disease may appear without any fault on defendant's part, and this is the form in which the question has generally been presented to the courts. The earliest case is *Hall v. Wright*, 1 E. B. & E. 746. There, after the contract, defendant became afflicted with a "bleeding at the lungs" making intercourse dangerous to him. It was held to be no defense. The Supreme

Court of Virginia reached a contrary result in *Sanders v. Coleman*, 97 Va. 690. There are also three American cases allowing the defense, where the disease was venereal. *Allen v. Baker*, 86 N. C. 91; *Shackleford v. Hamilton*, 93 Ky. 80; *Gardner v. Arnett*, 21 Ky. L. Rep. 1. Mr. Huberich seems to think that a distinction might be taken between venereal disease and other diseases, and that the English courts would allow the defense in the former case; but this seems at least doubtful. The decision in *Hall v. Wright* was based on two grounds: (1) that performance was not rendered impossible, and (2) that, even if it was impossible as to part, defendant could still give plaintiff the benefit of his social position. Both grounds seem equally applicable to venereal diseases. In case of such a disease as in *Hall v. Wright*, intercourse would be dangerous to defendant's own life, while venereal disease would endanger the life of plaintiff and the health of the offspring. Public policy might be stronger in the latter case, but it would be against the union in both. A recent New Jersey case seems to indicate that such a distinction as the writer suggests would not be taken. The disease was not venereal, but the court in a *dictum* carry the doctrine of *Hall v. Wright* to its logical conclusion and repudiate the North Carolina and Kentucky cases. *Smith v. Compton*, 58 L. R. A. 480.

The real question in all the cases would seem to be as to the true meaning of the contract. In contracts for personal services incapacity either of body or mind is an excuse for not performing. *Robinson v. Davison*, L. R. 6 Ex. 269. It would seem that the conditions implied in ordinary personal contracts should be extended rather than restricted in a contract so thoroughly personal in its nature as the marriage compact. To every contract of marriage might well be coupled the implied condition that a refusal to perform shall be justifiable if the situation of the parties has so changed, without fault on the part of defendant, that a consummation of the married state would be impossible or would endanger the life of either. This would seem to be the correct doctrine. It is in accord with the intention of the parties and is applicable to diseases of all kinds.

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A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS. By John W. Daniel. Fifth Edition. By John W. Daniel and Charles A. Douglass. New York: Baker, Voorheis & Company. 1903. 2 vols. pp. cliv, 933; x, 1004. 8vo.

To sound a discordant note in a chorus of praise is no pleasant duty. An examination of this work, however, convinces us that as there is a good deal of "law taken for granted," so here is a case of merit too freely conceded. It seems to be the fashion for writers of the perfunctory reviews of new editions of well-known law books to style them "legal classics." If all that is necessary to earn that title is to have a successful sale, to pass through several editions, and to be often cited by courts, then this book may be called a "legal classic." But if sound and scientific discussions of principles, accurate statements of the cases, and correct citations are essential to a "legal classic," then this work does not seem to us to deserve that name. We confess that we had ourselves been rather in the habit of taking the merit of the book for granted, and we have been surprised, as a result of a careful examination for the purpose of this review, to find how greatly we were mistaken.

The author, it is true, is more independent than is usual with the writers of legal text-books in the expression of opinion, whether in approving or in dissenting from the decisions of the courts, and this is a commendable feature of his work. But the value of an author's opinions depends largely on the reasons which he gives for them, and in this respect we do not find Mr. Daniel strong. He presents and defends his theories, not like a judge, but rather as an advocate holding a brief, often citing cases which only by a sort of twist can be made to seem favorable to his theories, and ignoring cases which are adverse to them. It is impossible within reasonable space to give more than a few instances.

In section 1361 Mr. Daniel dissents from the long list of authorities which hold that "the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance or afterward." Mr. Daniel claims that the holder of an unaccepted bill who presents it for acceptance or payment "warrants its genuineness" if he indorses it, and, if he does not indorse it, yet "his very assertion of ownership is a warranty of genuineness in itself." Taking together this section and sections 731 and 732 to which Mr. Daniel refers in support of his last proposition, it seems that he likens the holder to a vendor of the instrument, wholly overlooking the difference between a presentment for acceptance or payment and a sale. The implied warranty of genuineness arises only upon a sale or transfer, and all the cases cited in sections 731 and 732 are such cases. As to the indorsement of the holder, it is an error to say that the writing of his name on the back of the instrument when he presents it for payment is an indorsement so as to subject him to any of the liabilities of an indorser to the drawee. The holder is not in any true sense an indorser. His signature operates only as a voucher or receipt, and this is the meaning given to it by the best considered and latest decisions, none of which are referred to by Mr. Daniel, who cites in support of his view only four cases.

In the first of these cases, *National Bank v. Bangs*, 106 Mass. 445, the holder who indorsed the instrument (a check) was guilty of negligence in taking it, and his merit was therefore not equal to that of the drawee. Moreover, the holder was the payee, and the court drew a distinction between his case and that of a subsequent holder. The case is also distinguished in the same way in the later case of *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 396, a case not cited by Mr. Daniel. See also *Minneapolis Nat. Bank v. Holyoke Nat. Bank*, 182 Mass. 130, 134.

In the second case cited by Mr. Daniel, *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 612, the holder was also the payee and was guilty of negligence in taking the instrument.

The third case cited is *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, 4 Ind. App. 355 (erroneously cited as 4 Ind.). The court in this case relied on *National Bank v. Bangs*, *supra*, failing to notice the distinction there made between a payee and a subsequent holder. But as the instrument involved was not a bill of exchange, all that was said by the court as to the effect of the holder's indorsement was *obiter dictum*.

The fourth case, *Warren-Scharf Asphalt Paving Co. v. Commercial Nat. Bank*, 97 Fed. 181, has no tendency to support Mr. Daniel's proposition. The instrument, a forged check, was not paid by the drawee bank, but was received on deposit by the plaintiff bank, and the amount was drawn out by the agent of the payee, the defendant, who had indorsed the check with the name of the payee. It was a transfer of the instrument to the plaintiff, and the question was simply whether the defendant was bound by the indorsement of its name by its fraudulent agent.

But more strange than this citation of cases which do not support the text is the fact that Mr. Daniel cites none of the cases which contradict his proposition, although one of them, *Neal v. Coburn*, 92 Me. 139, is cited by him in other places. See sections 533 and 1655. In *Neal v. Coburn* the drawee bank paid a forged check to the holder. Upon discovery of the forgery and demand by the drawee bank, the holder repaid the money and then sued his indorser, who was the indorsee of the payee. It was held that as the plaintiff was not bound to refund to the drawee bank he could not recover from his indorser. It was claimed that the defendant by indorsing the check guaranteed to every subsequent holder the genuineness of the drawer's signature. But the court said, "The bank upon which the check was drawn did not become a holder. It did not purchase the check. The bank paid it, extinguished it. It was no longer a check and could no longer have a holder as such. It had become merely a voucher." It does not seem quite ingenuous to cite this case on other points and to omit it upon the point under discussion in section 1361.

The Supreme Court of Massachusetts has recently spoken in the same way.



In *Minneapolis Nat. Bank v. Holyoke Nat. Bank*, 182 Mass. 130, 134, the court said, "The indorsement of an indorser, using that word in its technical sense, imports a guarantee of previous signatures because it is a transfer and sale; but an indorsement which is not made for the purpose of transfer is not an indorsement within the law merchant, and does not carry with it a guarantee of previous indorsements." This case, it is true, was probably decided too recently to be cited in this edition of Mr. Daniel's book.

But Mr. Daniel fails also to cite in any part of his book the case of *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, decided in January, 1901, in ample time to have been included in this edition. In this case, in which the Supreme Court of Massachusetts adhered to the rule of *Price v. Neal*, 3 Burr. 1354, the forged checks, which were payable to "Cash," had been indorsed by the holder for payment through the clearing house. The court said (p. 396), "The indorsement of the check by the defendant was not an indorsement by the payee. It was not an indorsement for purposes of transfer, and contained no representations beyond what would have been imported by a presentment in person."

In section 139, in which he discusses the subject of fictitious payee, Mr. Daniel says, "It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such person he avers his existence, and he is estopped as against a holder ignorant of the contrary to assert the fiction." Two American cases are cited: *Kohn v. Watkins*, referred to as reported in Cent. L. J. (Jan. 27, 1882), although it has been for more than twenty years printed in 26 Kans. 691, and *Lane v. Krekle*, 22 Iowa, 404. In the last cited case the note was payable to the fictitious person or bearer, so that the fictitious character of the named payee was unimportant, but the opinion of the court contains a *dictum* in support of Mr. Daniel's position. Mr. Daniel cites also the three reports of the English case of *Clutton v. Attenborough and Son*, [1897] A. C. 90, failing to notice that the decision in that case rests on the unqualified provision of the English Bills of Exchange Act, sec. 7 (3), which provides that when the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. The only case which Mr. Daniel cites as contrary to his proposition is *Armstrong v. National Bank*, 46 Oh. St. 518. He does cite the case of *Chism, Churchill & Co. v. Bank*, which is *contra*, but it is difficult to judge from the manner in which it is cited in the note whether it is intended to be cited in support of the text or as opposed to it. It is moreover cited as in 96 Mass. 641, instead of 96 Tenn. 641, where it belongs. The name "Churchill" is also wrongly given as "Church." Mr. Daniel refers to this case as "citing the text" which would give the impression that it is in accord with Mr. Daniel's view, whereas the court cited the text only to disagree with it.

Mr. Daniel omits another adverse decision—*First Nat. Bank v. Farmers & Merchants Bank*, 56 Neb. 149, although this case is cited in sections 669a, 672, and 837 for other points.

Although it is perhaps not pertinent to the exact phase of the subject of fictitious payee just discussed, yet it is proper here to say that the case of *Tolman v. American Nat. Bank*, 22 R. I. 462, decided in March, 1901, is not referred to or cited by Mr. Daniel. This case, although wrong, as we believe, both in its statement of the law in the absence of statute and in its construction of the Negotiable Instruments Law, is yet important as the first case arising under the section of the Negotiable Instruments Law dealing with this point, and the omission to refer to it is a strange oversight in a book professing to be up to date.

Mr. Daniel's whole treatment of the subject of fictitious payee in sections 136 to 141 is unsatisfactory and imperfect. He does not point out or discuss the distinction drawn by the courts between cases where an instrument payable to the order of a named person is obtained by false impersonation of such person and where it is obtained by false assumption of agency for such person, the named payee in both cases being sometimes a real, sometimes a non-existing person.

In a sentence added to section 1663 in this edition there is a confused effort to state the effect of some decisions upon cases of false impersonation, although only when the instrument was a check, and here the case of *Tolman v. American Nat. Bank*, *supra*, might well have been cited as opposed to the cases cited in sec. 1663, n. 6. The sentence to which we refer begins as follows: "Cases have arisen in which checks have been paid on forged indorsement made by the person to whom the drawer delivered the check, mistaking his identity for *one whose money is designated as payee*." (The italics are ours.) We do not believe Mr. Daniel himself can interpret this sentence, written no doubt by one of his collaborators on this edition.

In section 726, which treats of the question whether an accommodation bill can be negotiated for the first time after maturity so that the indorsee can hold the accommodating party, Mr. Daniel states the English rule to be that it can be so negotiated and regrets that the American cases do not uniformly follow the English rule. Aside from overruled cases the English doctrine seems to have been followed only in Maine. There are many American cases to the contrary, some of which Mr. Daniel cites in note 56, to section 726. But late cases in Massachusetts, Rhode Island, and Pennsylvania, are not cited. One case, *Miller v. Larned*, 103 Ill. 570, cited as opposed to the English rule, is in accordance with that rule. Another case, *Donnerberg v. Oppenheimer*, 15 Wash. 290, referred to as "citing the text," does not involve the point, and the case does not cite section 726 but does cite section 726 a, and it was probably intended to be cited under the latter section, but it is not to be found in the notes to that section.

Again in section 790, in referring to the same subject, the author in note 98 cites the case of *Talmage & Co. v. Milliken & Meys*, 119 Ala. 40. This case is not in point. There is nothing in the report of the case to show that the instruments (bonds) had been negotiated after maturity. In section 726 Mr. Daniel states that in *Carruthers v. West*, 11 Q. B. 143, "a demurrer was sustained to a plea that it was agreed by the parties that the paper should not be negotiated after maturity, knowledge of the purchaser of such agreement not being averred." There was no such reason given by the court for the decision, which is in these words: "We think the plea bad," but the remarks of Wightman, J., during the argument show the reason to have been that the plea was consistent with the paper's having been indorsed to some one before maturity and indorsed to the plaintiff after maturity by such indorsee.

It is admitted in the English cases that, if there is an agreement that the instrument shall not be negotiated after maturity, one who takes it after maturity is bound by this agreement even though he had no notice of it. But the real question is, whether in the absence of an express agreement one is to be implied from the nature of the transaction. The American doctrine is more in accord with the business view, by which it is understood that the accommodated party shall take care of the instrument at maturity, and therefore that it is to be negotiated only before maturity. Mr. Daniel himself, in defining accommodation paper in section 189, says that the accommodated party "is expected to pay it."

The superiority of the American view becomes still clearer when we consider the case of an accommodation indorser, for his contract is to pay only in case presentment for payment is made at maturity to the party primarily liable on the instrument, and if the instrument has never been negotiated before maturity it cannot be presented for payment at maturity. This argument is strongly presented in *Chester v. Dorr*, 41 N. Y. 279. No notice is taken by Mr. Daniel of the cases of *Peele v. Addicks*, 174 Pa. 543, and *Same v. Same*, *ibid.* 549. The last mentioned case bears directly on the point discussed in section 726, but is adverse to Mr. Daniel's view.

In section 688 b, reference is made to a case holding that the statement of the value of the indorser's real and personal estate above his signature, is mere surplusage and does not vitiate the indorsement. Of course the question was whether signing a name under such a statement was an indorsement, and the court in the case intended to be referred to held that it was. No reference is

made to the case of *Pickering v. Cording*, 92 Ind. 306, which holds the contrary. The case to which Mr. Daniel intended to refer is *Dunning v. Heller*, 103 Pa. St. 271, but by one of those mistakes so common in this edition, note 48 cites the case of *James v. Ely*, 4 McLean, 173, which is the case intended to be cited in note 49, on another point.

In section 688 c, Mr. Daniel argues in favor of the view that a mere assignment written on a note over a party's signature subjects the signer to the liability of an indorser.

In this edition that form of combined self-approval and advertisement which consists in referring to cases as "citing the text" is continued to a wearisome extent, but here a case which cites the text for the purpose of expressly disapproving it is not referred to at all, although in the notes to section 669 a, which deals with another point, this case is cited as "quoting with approval the text." The case to which we refer is *Spencer v. Halpern*, 62 Ark. 595, in which is to be found probably the most complete refutation of Mr. Daniel's argument, the court discussing the reasons given by Mr. Daniel in section 688 c and overthrowing them.

In section 61 the case of *Overton v. Tyler*, 3 Barr 346, is condemned, and a long note is devoted to the case of *Zimmerman v. Anderson*, 67 Pa. St. 421. Mr. Daniel regards the distinction drawn by the court in the latter case as "a very fine distinction, — one without a material difference," and says that the court evidently does not regard *Overton v. Tyler* with much favor. Aside from the fact that the court in a later case, *Sweeney v. Thickston*, 77 Pa. St. 131, approved *Overton v. Tyler*, there is no difficulty in distinguishing *Overton v. Tyler* from cases in other states cited as opposed to it, and showing that it is not inconsistent with them. In Pennsylvania a judgment by confession may be entered before the debt is due if the instrument does not indicate that the warrant of attorney is to be available only in the event of default. The power of attorney to confess judgment in the note in *Overton v. Tyler* was not restricted so as to be available only after the maturity of the note, and the practice in Pennsylvania in such a case is to enter judgment before maturity of the note in order to obtain a lien on real property, although the execution cannot issue until after maturity. *Volkenand v. Drum*, 143 Pa. 525; *Integrity Ins. Co. v. Rau*, 153 Pa. 488; 18 *Banking Law Journal* 801. The effect of entering judgment before maturity of the note, as is pointed out by Gibson, C. J., is to merge the note in the judgment, and there is no longer any note to be the subject of negotiation. An instrument which may be thus terminated at any time is evidently not certain in time. In the cases in other states which seem to be opposed to *Overton v. Tyler* the power of attorney to confess judgment did not in terms or by force of the law of the state authorize the entry of a judgment before the maturity of the note, and in those cases in which the form of the instrument is given in the report the power authorized confession of judgment only in case of non-payment at maturity.

The Negotiable Instruments Law provides that negotiability is not affected by a provision which "authorizes a confession of judgment if the instrument is not paid at maturity." This law has been adopted in Wisconsin. Yet in *Wisconsin, &c. v. Babler*, 91 N. W. 678, the Supreme Court held that a note, containing a power of attorney to enter judgment on it at any time after its date "whether due or not," was not negotiable. So although the Negotiable Instruments Law has been adopted in Pennsylvania, such a note as that in *Overton v. Tyler*, in view of the practice in that state of entering judgment before maturity, must still be regarded as non-negotiable. See 18 *Banking Law Journal* 801.

We have been unable to find a case in which a note authorizing entry of judgment on it before maturity has been held negotiable, and the condemnation by Mr. Daniel of *Overton v. Tyler* seems to rest on a failure to notice the difference in the form of the notes and in the practice as to the time when judgment by confession may be entered. See *Thomas v. Pendleton*, 1 S. Dak. 150.

Section 1255 purports to state the law of England and its history as to the rights of a payor *supra* protest, and states that an earlier case to the contrary

was subsequently overruled in *Ex parte Lambert*, 13 Ves. 179, and "the doctrine of the text established," that doctrine being that the payor *supra* protest is subrogated to the rights only of the party for whose honor he pays. If Mr. Daniel had continued his study of the history of the subject he would have found that in *In re Overend, Ex parte Swan*, L. R. 6 Eq. Cas. 344, Malins, V. C., refused to follow *Ex parte Lambert*, and held that the payor *supra* protest succeeds to the title of the person from whom, not for whom, he received the instrument, and has all the title of such person to sue on it except that he discharges all parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot indorse it over. Since this time *Ex parte Lambert* has been regarded as overruled, (4 AM. AND ENG. ENCY. OF LAW (2d ed.), 499), and it is included in the Table of Overruled Cases in Chalmers' Digest. Nor does Mr. Daniel seem to be aware that the rule established in *In re Overend, Ex parte Swan*, has been abrogated by section 68 (5) of the English Bills of Exchange Act, and that the Negotiable Instruments Law followed suit, Sec. 304 (N. Y.). At least he makes no mention of these facts, and the case of *In re Overend, Ex parte Swan*, is not cited in his work.

This edition contains, as an appendix, the Negotiable Instruments Law, giving the New York numbering of the sections. No new book on Negotiable Instruments and no new edition of an old book could be complete without including this law, which has already been adopted in so many states, and will no doubt become law in all. But it is not enough to give the law as an appendix. Changes in conflict with the old cases should be noticed when such cases are stated in the text and cited in the notes. In this respect the last edition of Daniel is very imperfect. We note only a few of the omissions.

Section 697, treating of the subject of conditional indorsements, cites *Robertson v. Kensington*, 4 Taunt. 30, to the effect that an acceptor who pays an indorsee to whom the paper is indorsed conditionally is liable to the indorser if the condition has not been performed. Mr. Daniel makes no reference to the fact that in England the law was changed by Bills of Exchange Act, sec. 33, and that the Negotiable Instruments Law, sec. 69 (N. Y.), also provides that the party required to pay the instrument may disregard the condition and make payment to the indorsee, whether the condition has been fulfilled or not.

We find here an instance of the practice, so frequent in this edition, of citing irrelevant cases. The text of THOMPSON ON BILLS, 232, is quoted to the same effect as *Robertson v. Kensington*, and in the note (87) the case of *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506, is cited. This case has no bearing whatever on the point. It was a case in which the accommodation payee of a note indorsed it upon an agreement with the accommodation maker that it should be negotiated in Kentucky. In an action against this indorser, the plaintiff, who was not a holder in due course, was held bound by the defense that the agreement had been broken and the note negotiated in New York. The case throws no light on the question whether the maker of a note or acceptor of a bill should be subjected to the additional burden of ascertaining whether a condition added by an indorser to his indorsement has been performed before the obligation can safely be paid to the indorsee. The case of *Savage v. Alden*, 2 Starkie 232, cited in section 697, n. 85, with *Robertson v. Kensington*, is also wholly irrelevant. But this error goes back to the first edition.

In sections 306 and 307 Mr. Daniel holds, in accordance with the weight of authority, and very properly we think, that an agent who signs for a principal without authority is not liable on the instrument, but only for falsely assuming authority, or upon an implied warranty of authority. But no notice is taken of the fact that the Negotiable Instruments Law in section 39 (N. Y.) impliedly makes the agent liable on the instrument.

Section 606 states the rule in *Smith v. Clarke*, Peake 225, which permits a holder of a bill indorsed in blank by the payee to strike out subsequent special indorsements and recover as bearer under the blank indorsement. Section 8 (3) of the English Bills of Exchange Act, which abrogates this rule (Chalmers, 5th ed., 26) is not referred to, nor is section 28-5 (N. Y.) of the Negotiable In-

struments Law, which has the same effect, although section 70 (N. Y.) of the same law seems by an inadvertence to restore the rule. This is one of the questions arising under the Negotiable Instruments Law which were discussed in those articles by Professor Ames and Judge Brewster in the HARVARD LAW REVIEW and YALE LAW JOURNAL, and by Mr. McKeehan in the AMERICAN LAW REGISTER, which are such notable contributions to the subject and which should be noticed in any new work on Negotiable Instruments.

In sections 1698 a and 1702 a Mr. Daniels contends that a certificate of deposit payable on demand is not dishonored until presented, and in sections 1707, 1707 a, that the Statute of Limitations does not begin to run against such a certificate until demand has been made, and in section 1683 he maintains the same principles as to bank notes. In these claims we think he is right, although there is a conflict of authority, particularly as to the certificates of deposit. But Mr. Daniel fails to state that section 130 (N. Y.) of the Negotiable Instruments Law, in providing that presentment for payment is not necessary to charge the person primarily liable on the instrument, changes the law as to certificates of deposit and bank notes payable on demand in those states in which the Negotiable Instruments Law has been adopted and in which demand had previously been required.

Whatever may be the merits of previous editions of this work, it is clear that this edition is a slovenly piece of book-making. In almost every place where we have tapped the book errors have flowed forth. We have already mentioned a number. Here are a few of the others.

In the table of cases, *Bay v. Coddington* is given as in section 826. It is not there mentioned, but note 10 to that section reads "See New York cases on this question, § 831 b," which last section, however, contains no New York case. Section 831 c is the one intended.

In section 1362 is to be found this unmeaning sentence: "Negligence in making paper under a mistake of fact is not now deemed a bar to the recovery of it." Reference to previous editions shows that in the first and second editions "payment" not "paper" was the word used, and that in the third edition this error slipped in, and has been repeated in all subsequent editions.

In section 189, n. 57, the case of *Springs v. McCoy*, 122 N. C. 629, is so erroneously stated as to make it seem to hold the exact opposite of the decision. This case really begins on page 628, but it is a common practice in this edition to cite cases, not by the first page of the case, but by the page of the opinion where the doctrine set forth by Mr. Daniel is to be found. In referring to the cases thus cited by Mr. Daniel we have been obliged to cite them in the same erroneous way in order to identify them as the same cases.

In the next to the last line of section 1215, n. 76, the word "inspection" should be "inception." In note 44 to section 139 the case of *Clutton v. Attenborough & Son* is cited as in L. R. App. Cas. 90 (1896). This is an error both as to the date and the mode of citation. It should be [1897] A. C. 90.

The case of *First Nat. Bank v. Farmers and Merchants Bank*, 56 Neb. 149, is mentioned in the table of cases, in sections 660a, n. 42, 672, n. 58, and 837, n. 4, and in each case "Mechanics" is substituted for "Merchants."

In section 136, n. 35, the case of *Kohn v. Watkins* is given as *Kohn v. Lewis*. The case of *Chester v. Dorr* is given in the table of cases as *Chester v. Door*. *Young v. Grote* is given in the table of cases as cited in § 1313. It is not to be found in that section or in the notes to it. But mistakes of this kind are so common in this edition that we forbear to give further examples. This edition continues to cite many cases as reported only in law reviews, although they have been for years published in the regular reports.

We have made no special effort to find errors in this edition. None is necessary; they *sautent aux yeux*. Those which we have mentioned and others have come to our notice either when we have opened the volumes at random or when we have examined them to find Mr. Daniel's views upon some controverted point. The notes to this edition add little to the value of the book. They contain many recent cases, but the arrangement is frequently such that the reader cannot ascertain from the note itself whether a case is in accord with

the text or opposed to it, and the doubt is often resolved only by finding that it is neither, because it is irrelevant. Mr. Daniel's book first appeared in 1876, more than twenty-five years ago, and in the interval the law of negotiable instruments has made progress. The scientific and effective way to prepare a new edition of such a book would be to remould and rewrite a large part of it, as was done with *SEDGWICK ON DAMAGES*. Adding paragraphs to sections and trying to fit new pieces into old notes has resulted in a patchwork which must be confusing to the student and a snare to the practising lawyer. It is never quite safe to trust the statements of a text-book as to the contents of a case, but it would be positively dangerous to take any chances with this work, so full is it of pitfalls for the incautious. In conclusion, it is fair to say that for the errors peculiar to this edition Mr. Daniel is not primarily responsible. The preface informs us that by reason of other exacting employments he could not give to the preparation of this edition his close personal attention, and that the work for the most part was done by others. But Mr. Daniel's debt to his assistants does not seem to be a heavy one.

J. D. B.

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**THE LAW OF SURETYSHIP.** By Arthur Adelbert Stearns. Cincinnati: The W. H. Anderson Co. 1903. pp. xvii, 747. 8vo.

In his preface the author sets forth the wide range in the problems that come within the law of suretyship in the most extended sense of that word. Under this head he classes generally all contracts in which two or more are jointly or severally bound for the same duty, also those contracts in which the debtor secures his obligation by the pledge or mortgage of his property. It is not usual to find so clear an apprehension of the problem in suretyship. Wherever there is a principal obligation, and wherever there is a secondary obligation to secure that principal obligation, there is suretyship. If the secondary obligation is a promise, the special situation may be described as personal suretyship; if the secondary obligation is a conveyance, the special situation may be described as real suretyship — in either case the general situation may well be described as suretyship. Personal suretyship is that which is by accepted usage called suretyship, while real suretyship is by accepted usage called mortgage; but in truth suretyship and mortgage are so interwoven that they may always be treated together with advantage, and can never be divided without disadvantage.

One of the most difficult problems of the law of suretyship, indeed a problem both in suretyship and in mortgage, is as to the creditor's right to the surety's securities. The author states the law in the ordinary form upon that question in section 272: that there is subrogation given in favor of the creditor to the securities held by the surety which have been given to him by the debtor. Upon a careful examination of the situation this law seems not to be well founded. It is true that the surety is surety in a personal suretyship, and is debtor therefore of the creditor in that suretyship. But the surety is mortgagee also in a real suretyship of the securities which the principal debtor has given him for his indemnity. It is difficult to see how as to these securities the surety owes any duty to the creditor in the personal suretyship more than to any other creditor of his. The true solution, it seems, is that the proceeds of these securities are the property of the surety, and should be distributed therefore as general, not as special assets.

This example is enough to show the importance of following, in future discussions of the law of suretyship, the lead taken by the author in this treatise. The law of suretyship cannot be worked out without comparison with the law of mortgage; the law of mortgage cannot be appreciated without collation with the law of suretyship. Indeed the desirable end in such investigations is the establishment of general principles applicable to the law of suretyship in this extended sense, namely, the situation in which there are two things in the hands of the creditor, one primary, the other secondary — both for his one satisfaction.

B. W.

**A TREATISE ON THE LAW OF PRIVATE CORPORATIONS.** By Wm. L. Clark and Wm. L. Marshall. St. Paul: Keefe-Davidson Law Book Co. 1901. 3 vols. pp. xxxi, 1-828; xxviii, 829-1716; xxxii, 1717-3038. 8vo.

During a little more than a century the law of corporations has developed from a few insignificant principles having little bearing upon the ordinary affairs of life, until it has become one of the chief divisions of our law and the one most closely connected with all business relations. Some of its principles are still in the formative stage, and many others have but recently become clearly determined. Especially is this true with reference to that branch dealing with private corporations, which, from the tremendous growth of business corporations in the past few years, has become in many respects the most important topic of the whole law. On account of this situation, a clear, concise, accessible, and complete discussion of the whole field of the law of private corporations is most essential, not only for the present understanding of the subject, but even more as an aid to its future development. The present work is a most successful attempt to meet this need.

Within the space of three compact volumes, the writers thoroughly cover every phase of their subject and its many details. Each principle is clearly stated and its application made to the many different situations that may arise. Often concrete illustrations are used for greater clearness. Especially upon the points where the authorities are in conflict is the treatment clear and convincing. The conflicting views are carefully stated and the results of each are shown. The question at issue is reduced to its lowest terms and the fundamental point of difference thus indicated. The authors then briefly and almost uniformly with sound reasoning point out what they deem the true guiding principle and the direction in which its adoption would lead. Particularly noteworthy from this point of view is the discussion upon *De Facto* Corporations, together with the allied topics, and the treatment of that most difficult subject, the Effect of *Ultra Vires* Transactions. The latter is an important contribution to the literature of the subject, not so much from any new theory that it presents as from its careful analysis and criticism of the conflicting views. Special attention might likewise be called to the chapters on Consolidation and Reorganization, Watered Stock, and Management of Corporations.

The real secret of the value of the work is in the thorough analysis of each topic and sub-topic, which has been carried out with great detail. The topics of each chapter are carefully selected, each chapter is divided into sections and sub-sections, and these last are often again divided. Each paragraph has its black-letter title, and at the beginning of the chapters these titles are brought together in the form of an outline, showing at a glance not merely the contents of the chapter, but, what is more important, the mutual relations of the constituent parts of the particular subject under consideration. Also at the beginning of each chapter or main division there is a brief black-letter head-note or summary. These are concise and comprehensive, and constitute excellent *résumés* of the various topics. This method presents in distinct outline the principles at the basis of the rules of law, and makes clear the relations of these rules one with another, thus evolving a connected system of jurisprudence out of what might otherwise appear to be an undigested mass of cases. This method, too, coupled with an excellent index, makes it an easy task to find any particular topic, a merit of very great value to the busy attorney, and one which is too often neglected.

As a statement of the law and of its underlying principles, the writers have produced in this work a really notable book. It does not purport to be a criticism of the law, and on settled points they have little to do with theoretical discussion beyond stating the reason at the basis of the rule. In case of conflicting views they enter the field of criticism briefly but sufficiently for an understanding and a decision of the question at issue. In the citation of cases they give only the leading ones, except upon the mooted points, where the citation is said to be exhaustive. The whole plan, both in its conception and its achievement, renders the book an eminently practical treatise, and one of



the very character most needed in dealing with the countless important questions which are constantly arising from the complicated system of corporations that rules the business world of to-day.

W. H. H.

JOHN MARSHALL. LIFE, CHARACTER AND JUDICIAL SERVICES. Edited by John F. Dillon. Chicago: Callaghan & Company. 1903. 3 vols. pp. lviii, 528; iv, 565; v, 522. 8vo.

On February 4, 1901, was celebrated the one hundredth anniversary of the day on which John Marshall first took his seat as Chief Justice of the United States. This celebration was, as Judge Dillon says in the introduction to the present work, "the most remarkable, voluntary, spontaneous tribute in its extent and character, which, in the history of our profession, in any country or in any age, was ever paid to the name and memory of a judge long since deceased." Under the auspices of the national and state governments, of the courts and the bar associations, exercises were held in the national Capitol and in thirty-seven states and territories. At these exercises more than fifty principal orations and addresses were delivered by eminent lawyers, judges, and scholars. It is these orations and addresses which are now collected and published in three handsome volumes. The collection is practically complete and the principal addresses are given in full or with unimportant omissions. To these are added five notable eulogies, delivered on past occasions by Horace Binney, Joseph Story, Edward J. Phelps, Chief Justice Waite, and William Henry Rawle. The editor contributes an admirable introduction.

On account of the limitations which necessarily result from the original nature of the contents of the work, the collection cannot take the place of a complete biography of Marshall, nor even, perhaps, of a full and elaborate discussion of the importance, quality, and value of his work. But these volumes are admirably fitted, both to whet the appetite for books whose character permits fuller and more formal study, and to supplement what can there be found. The addresses here included touch more or less upon Marshall's personal appearance and personal traits, his private as well as his public character, the story of his life, his rank merely as a judge, and the nature and effect of his more important judicial decisions. But happily the speakers almost without exception recognized that their most appropriate and significant theme was to be found in an estimate of his place and his work as one of the founders of the nation. It is this above everything else which constitutes Marshall's title to the admiration and gratitude of posterity, and it is in this field also that the solemn and deliberate judgments of half a hundred scholarly and practical men of the present day are of most value. In few of these addresses do we note the tendency so prevalent on such occasions to indiscriminate praise. The prevailing tone is warm and enthusiastic, but it is also in a sense judicial. Though each speaker must have consulted largely the same materials as the others, each has approached them from his own point of view, and in most cases stamped his conclusions with the marks of his own mental attitude and independent thought. No one historian or biographer can possibly present a complete and just estimate of any great man because no one historian or biographer can be fitted by personal sympathies and aptitudes to appreciate all the elements, good or bad, that make up a great man. It is this fact which gives to the present work its chief interest and value for the student.

To those of his own profession, as lawyers and as citizens, the elements in Marshall's character and work, which are discussed with clear appreciation and vigorous eloquence throughout these volumes, should prove a double inspiration. It is well to be reminded, in these days when the principles which Marshall established are accepted so completely as to seem almost self-evident, that there was a day when those principles were the subject of grave doubt and bitter conflict. It is well also for the legal profession to remember that Marshall's construction of the powers and duties of his court not only gave that court a position and dignity which his predecessors had not hoped nor claimed

for it — and which raised it above any other court in the world — but also, and as a necessary result, gave to his profession and ours a new importance, dignity, and responsibility. At the same time he taught us how to realize its importance with modesty, to maintain its dignity without affectation, and to discharge its responsibility with courage and power. If Judge Dillon's collection enforces these lessons, by the new interest and enthusiasm it may well inspire, it will indeed prove its value.

H. W. D.

**THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT.** By Louis L. Hammon. St. Paul: Keefe-Davidson Company. 1902. pp. xxx, 1233. 8vo.

The law of contract constitutes a basis of so large a part of the common law system and has such a vital influence upon all business relations that a new discussion of the subject is almost always helpful and welcome. The present work covers the whole field quite exhaustively, with especial reference to its modern developments. In addition to the more fundamental principles, it includes several matters not generally discussed so fully in the usual work of this kind. The chapter dealing with illegal contracts is especially noteworthy in this regard. The discussions also of the capacity of parties, and the effect of mistake, misrepresentation, fraud and undue influence, deserve particular mention. It is the full treatment of topics such as these that gives completeness and value to this work.

As in case of several other publications of this house that we have had occasion to notice, considerable care has been taken to render the contents of the book readily accessible. This is accomplished by means of analytical tables of contents for each chapter, black-letter titles for each section, and black-letter summaries for the main topics. This method not only greatly reduces the mechanical labor of legal investigation, but also adds considerably to the clearness of the discussion through the careful analysis of the subject that is necessary for the proper execution of such a plan. The writer has done this part of his work thoroughly and well.

Though the scope of the volume is very comprehensive, many of the topics are stated merely in outline or with only a brief discussion of the main rule. This, however, is wise, for a general text-book of this nature should not be encyclopædic, but should leave more detailed consideration to special investigators. It should bring together all the general principles of the subject into one connected discussion, which may be a convenient reference manual for the practitioner and the student, and serve as a point of departure for more detailed research. This end Mr. Hammon has accomplished with considerable success. The work is distinctively commendable and should prove acceptable to the profession.

W. H. H.

**HUGHES ON CONTRACTS.** By William T. Hughes. Chicago: Callaghan and Co. 1903. pp. 608. 8vo.

The plan of this book is novel. The author has divided it into three parts containing respectively twenty, one hundred and thirty-two, and four hundred and thirty-nine pages. In the first part he discusses the fundamental conceptions of law, and in the second the leading phases of the subject of contracts. The last part, styled a text-index, constitutes the most important and most valuable part of the work. It consists of a digest or encyclopædia of leading cases arranged alphabetically both under the name of the case and under an appropriate topic. The citation of each case is given not only to the regular reports but also to text-books, case-books, and other works in which discussions of it may be found. Under each case similar cases are also cited and briefly abstracted. The purpose of the author, as explained in his preface, is not to

discuss subjects in great detail himself, but to refer to the "great leading and annotated cases upon each proposition stated."

The author's manner of dealing with his subject could be improved, it would seem, by a more careful analysis. Much space is consumed in partially discussing in one place what is more fully discussed in another. For example, practically all the matter given in the first part is repeated in more expanded and more accurate form in the second, so that the first part seems superfluous. The term "contracts" is inaccurately applied to many topics which it does not properly include, such as judgments and quasi-contracts. Certain discussions of subjects admitted not to belong to the field of contracts seem rather out of place, as, for example, the ninety-page treatment of criminal law in the third part. Too much prominence is given to Latin maxims which are so often on close analysis found to be meaningless or erroneous. What errors appear in the book are usually due to statement so condensed as to be misleading, or to a failure to find the ultimate principle, rather than to absolute misconceptions.

The chief value of the book would seem to be as a general index to textbooks and other authorities. It will be useful in looking up the broad principles of the law of contracts rather than for careful preparation on a given case. It is a good book for finding quickly in a general way what the law is.

**A TREATISE ON COMMERCIAL PAPER AND THE NEGOTIABLE INSTRUMENTS LAW.** By James W. Eaton and Frank B. Gilbert. Albany: Matthew Bender. 1903. pp. xciii, 767. 8vo.

This work resembles in general arrangement the standard treatises on commercial paper, but the method of handling the details of the subject is somewhat new. In this regard the volume might almost be described as a running comment on the Negotiable Instruments Law. The text selected for discussion is that of the New York Act, but there are cross references to the statutes of all the other twenty or more jurisdictions in which the Law is now in force. After citing the provisions of the New York Act, the authors indicate by a summary of the common law decisions the extent and nature of the changes which the legislature has brought about. This manner of treatment is logical and effective and may be commended as the best idea in the book.

The authors make no attempt to do more than state decisions of the courts. The principles of the law merchant and the reasons and customs which underlie them are omitted. Even such a disputed point as the reason for the liability of the acceptor of a forged bill is not discussed. Such a work, it would seem, can hardly be regarded as a real contribution to the study of the law of negotiable instruments.

In the field which they attempt to cover the authors are generally accurate. There is, of course, an occasional omission. For instance, under the Negotiable Instruments Law, one who takes incomplete paper, although for value and without notice, must ascertain at his peril the actual amount for which the possessor has authority to fill in the blanks. Formerly in America possession of the instrument was sufficient evidence to a *bona fide* purchaser of authority to fill up to any amount. *Fullerton v. Sturges*, 4 Oh. St. 530. This distinction between the common and the statute law is not clearly pointed out. Such omissions, however, are rare, and, as a manual for the practising attorney, the book may well be of use.

**CASES ON EQUITY PLEADING AND PRACTICE.** By Bradley M. Thompson, Jay Professor of Law in the University of Michigan. Chicago: Callaghan and Company. 1903. pp. ix, 326. 8vo.

The study of law by the case-system aims at giving the student a knowledge of how to find the law and a training in legal reasoning which will enable him to apply it when found. To gain these two objects, especially the latter, it

seems that a detailed treatment of a subject is essential. The general principles are usually plain and not open to argument. The difficulty comes in the details of their application, and it is here that there is room for the free discussion in class without which the mere study of the cases is of little value.

The compiler of the present volume, however, has attempted to make it comprehensive in scope. He has covered the whole field of Equity Pleading and Practice, beginning with a consideration of Persons Capable of Suing and ending with cases on the special Bills of Interpleader and Bills to Perpetuate Testimony. Yet the book contains but three hundred and twenty-six pages. The result is that each branch of the subject is touched upon with an extreme generality which is unfortunate for the two special purposes of a case-book. And owing, doubtless, to the same lack of space, there is no attempt to indicate the historical or logical development of the law. If the author had made a judicious selection of the main divisions, — if, for instance, he had confined himself to the ordinary course of a suit in Equity and treated the different pleadings more exhaustively, — he would have produced a more valuable book for classroom work. In its present form, however, the volume gives a fair general idea of what the various pleadings are.

**A TEXT-BOOK OF LEGAL MEDICINE AND TOXICOLOGY.** By Frederick Peterson and Walter S. Haines. Philadelphia, New York, and London: W. B. Saunders & Co. In two volumes. Vol. I. 1903. pp. 730. 8vo.

This work appears to be rather a medical text-book than a legal treatise. It is intended for the lawyer who may have occasion to investigate thanatological, biological, or toxicological matters. Thus the various chapters are written by men well known in the medical world and not by legal text-writers, and, with the exception of the two chapters dealing with the medical jurisprudence of life and accident insurance, the citations are principally to medical works. The more purely legal aspects of medical jurisprudence, such as the legal rights and duties of physicians and coroners, or the laws relating to the practice of medicine, are practically omitted, while the more purely medical aspects, such as the means of identifying partial remains, or the effects of various kinds of wounds and injuries, are fully treated. The work seems to cover very much the same ground as earlier works of the same class, as for example the fourth edition of Taylor's Medical Jurisprudence or the more extended work of Witthaus and Becker. But as it is somewhat later in publication, it naturally represents a learning in some respects more recent; thus the second volume promises to contain a chapter on the medico-legal bearings of the X-rays. The fact that it is a compilation of treatises by specialists on the various subjects considered would also tend to give it more weight as an authoritative work than it would have if written entirely by one or two men. The work could hardly be of very general service to an attorney, but, as it appears to be an excellent one of its class, it might well prove of considerable value in a case turning largely on medical evidence.

**THE ELEMENTS OF THE LAW OF NEGOTIABLE INSTRUMENTS.** By John W. Daniel and Chas. A. Douglass. New York: Baker, Voorheis & Company. 1903. pp. xxxi, 418. 8vo.

The practical experience of Mr. Daniel added to the theoretical learning of Mr. Douglas, a teacher of the law, should make a distinct success of a work "designed exclusively for the use of students and instructors in law schools." Based on the larger work by the same authors contemporaneously published and reviewed in the present issue of this magazine, it necessarily reflects both its defects and its merits. In condensing their work into one small volume, the authors have apparently made it their primary purpose merely to set forth the

present state of the law. They thus furnish the student with much knowledge in convenient space; but by omitting any extensive treatment of the underlying principles of the law, their origin, development and successive applications, they provide little material for original thought and mental discipline. The condensed nature of the book leads likewise to an inadequate discussion of particular subjects. Thus the difficult subject of anomalous indorsement is dismissed with a single page. Few cases are cited, the authors preferring to refer the student to other text-books. The table of cases does not disclose the cases of *Price v. Neal*, 3 Burr. 1354 and *Minet v. Gibson*, 3 Term Rep. 48. The case of *Young v. Grote*, 4 Bing. 253, is cited as if it were still law, no reference being made to the English and American cases which qualify it. Mechanically the book is very satisfactory; the type is large, the binding strong and flexible. The work may prove of value in many law schools where the text-book system still obtains.











